Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

GREGORY ARTHUR OTT,

Petitioner,

v.

GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

On Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER 28 U.S.C. § 2244(d)(2), WHICH TOLLS THE LIMITATIONS PERIOD FOR FILING A FEDERAL HABEAS PETITION FOR "STATE POST-CONVICTION OR OTHER COLLATERAL REVIEW," INCLUDES THE NINETY DAYS IN WHICH A STATE HABEAS PETITIONER MAY FILE A PETITION FOR WRIT OF CERTIORARI IN THIS COURT?

WHETHER EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS IN 28 U.S.C. § 2244 MAY BE DENIED A STATE INMATE FOR WHOM TIMELY FILING OF THE PETITION IN FEDERAL COURT WAS RENDERED IMPOSSIBLE BY IRREGULAR STATE COURT NOTICE OF DECISION?

WHETHER BRIEFING OF ISSUES ON APPEAL PROVIDES SUFFICIENT NOTICE TO A CIRCUIT COURT FOR EXPANSION OF A CERTIFICATE OF APPEALABILITY?

INTERESTED PARTIES

1. Gregory Arthur Ott, Petitioner.

2. Gary L. Johnson, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.

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The opinion of the Fifth Circuit in this case, *Ott v. Johnson*, 192 F.3d 510 (5th Cir. 1999) is contained at App. 1 et seq. The opinion denying rehearing is contained at App. 9.

JURISDICTION

The Fifth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 2254. This Court has certiorari jurisdiction under 28 U.S.C. § 1257 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9, Clause 2

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Amendment XIV

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2244(d)

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a

State court. The limitation period shall run from the latest of – (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. . . .

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2253(c)(1)

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a habeas proceeding in which the detention complained of arises out of process issued by a State court. . . .

Rule 22, Federal Rules of Appellate Procedure

A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

Rule 9, Rules Governing Section 2254 Cases in the United States District Courts

Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its

> filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

STATEMENT OF THE CASE

In March 1978, Ott was indicted in Denton County, Texas, for the offense of capital murder. The indictment alleged that on or about the 20th day of February 1978, Ott

> . . . did then and there knowingly and intentionally cause the death of an individual, Bobby Doherty, by shooting him with a gun, and the said Bobby Doherty was then and there a peace officer acting in the lawful discharge of an official duty, to wit: assisting in a Criminal Investigation, and the defendant knew the said Bobby Doherty was a peace officer.

In June 1978, a jury convicted Ott of the lesser included offense of murder and assessed his punishment at life. Ott's conviction was affirmed on direct appeal. *Ott v. State*, 627 S.W.2d 218 (Tex. App. – Fort Worth 1981, *pet. ref'd*).

In 1988, Ott filed a state petition for writ of habeas corpus pursuant to Article 11.07, Texas Code of Criminal Procedure, which contested the trial court's *sua sponte* inclusion in the judgment and sentence of an affirmative finding of the use of a deadly weapon. That writ was granted by the Texas Court of Criminal Appeals in an unpublished opinion on May 31, 1989. As a result of the

Court's holding, Ott's parole eligibility was no longer to be computed on the basis of flat time served, but also included consideration of good conduct time. On August 9, 1989, the Texas Board of Pardons and Paroles ("Board") found that Ott would be eligible for parole in February 1990.

On January 10, 1990, the Board recommended that Ott be granted parole pending further investigation. On January 12, 1990, notification was sent to the trial officials as per the then existing statutory scheme (i.e., notification to the District Attorney, Mr. Jerry Cobb, the Denton County Sheriff, Mr. Kirby Robinson, and the District Judge of the 158th Judicial District Court, the Honorable Philip Vick). The elected District Attorney, Mr. Jerry Cobb (who had also tried the case back in 1978), elected not to protest Ott's parole and did not file a protest within the time frame designated. Protests were also not timely submitted by either the Sheriff or the District Judge.

Accordingly, Ott received notification of the decision to parole him on January 31, 1990. The Board Minutes reflect that this decision was finalized from the Board's perspective and a parole certificate was issued on February 16, 1990. On Thursday, February 22, 1990, Ott learned that he was to be transferred the following day to the Walls Unit of the Texas Department of Corrections in Huntsville for release on Monday, February 26, 1990, at 9:00 am. On Friday, February 23, Ott was transferred to the Walls Unit as scheduled for release the following Monday, February 26, 1990. On Saturday, February 24, 1990, the warden advised Ott that his parole had been rescinded by the Board. The Board Minutes reflect that Ott's parole certificate was voided on February 23, 1990.

The Board Minutes also reflect that an entirely different panel from the panel which approved the parole was the panel that rescinded and revoked the parole.

Ott has been diligent in seeking parole since 1990, and has been unable to gain any relief despite having the support of the District Attorney who presided at his trial, Jerry Cobb, and having passed a polygraph administered by Ernie Hulsey that strongly supports the conclusion that he is actually innocent of intentionally and knowingly causing the death of Ranger Bobby Doherty.

After February 11, 1992,[1] Ott participated as a class member in a suit, originally filed in the Western District federal court in Austin on February 26, 1985, that challenged the Board's use of protest letters in making its parole decisions. A bench trial was held in that court on June 9-12 and 23-26, 1992, and July 16, 1992. The class action resulted in two memorandum opinions by Magistrate Judge Stephen H. Cappelle on November 1 and December 1, 1995, holding that the Board's statutory scheme, allowing it to receive and consider protest statements without disclosure of their existence, source, or contents to the potential parolee, violated the inmates' equal protection rights. *See Johnson v. Texas Department of Criminal Justice*, 910 F. Supp. 1208 (W.D. Tex. 1995) (hereinafter *Johnson I*). On April 30, 1996, Magistrate Cappelle issued another memorandum opinion awarding the plaintiffs' attorneys fees, expenses and costs, and post-

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[1] On this date, Magistrate Judge Stephen H. Cappelle designated the class as all present and future inmates of the Texas Department of Criminal Justice – Institutional Division. *Johnson v. Rodriguez*, 110 F.3d 299, 302 (1997).

judgment interest. *See Johnson v. Rodriguez*, 110 F.3d 299, 302-03 (5th Cir. April 23, 1997), *cert. denied*, 118 S. Ct. 559 (1997). The magistrate's judgment on the merits and award of fees were appealed to the Fifth Circuit Court of Appeals.

During the time *Johnson* was pending in the federal courts, Ott did not file a successor petition in state court for three reasons: (1) he was diligently continuing to seek relief from the Texas Board of Pardons and Paroles while *Johnson* was pending; (2) he reasonably was abating his pursuit of state post-conviction relief until the Fifth Circuit ruled on the suit in which he was a class member, so as to avoid being accused of forum-shopping or losing his parole claims to the Texas Court of Criminal Appeals' abstention and court-generated abuse of the writ doctrines;[2] and (3) he waited for the Fifth Circuit's ruling so as not to waste the federal courts' time with immature or frivolous claims.

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[2] Under the abstention doctrine, which is based upon the principle of comity between the state and federal courts, the Texas Court of Criminal Appeals refuses to take any action on claims pending in the federal courts. *See Ex parte Green*, 548 S.W.2d 914 (Tex. Crim. App. 1977) (citing *Ex parte Powers*, 487 S.W.2d 101 (Tex. Crim. App. 1972)). Had Ott submitted a state application for writ of habeas corpus, the Texas Court of Criminal Appeals would have refused to take action on his parole claims because they were before the Fifth Circuit, requiring him to present them again in a *third* state petition, which almost certainly would have been denied merits review on the ground of abuse of the writ. *See Ex parte Barbour*, 879 S.W.2d 889 (Tex. Crim. App. 1994), *cert. denied*, 513 U.S. 1084 (1995).

In February 1997, when the class action had remained with the Fifth Circuit to the point that it appeared Ott had no option but to make an application to the state courts, the undersigned informed Ott of the fact that there was a forthcoming deadline if he wanted to preserve his right to proceed into federal court. In a letter dated March 22, 1997, Ott authorized the undersigned to proceed so that a state court writ could be filed before April 24, 1997, the termination date of the federal court "grace period" for persons in Ott's procedural stance. *Davis v. Johnson*, 158 F.3d 806, 810 n.5 (5th Cir. 1998) (applying *Flores, infra*, to 28 U.S.C. § 2254 petitions); *United States v. Flores*, 135 F.3d 1000, 1006 (5th Cir. 1998) (adopting one-year grace period for 28 U.S.C. § 2255 motions).

Ott filed his second application for a state writ of habeas corpus on April 23, 1997, pursuant to Article 11.07, Texas Code of Criminal Procedure.[3] Under the

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[3] Ott raised the following Claims for Relief, which were filed again in the federal district court:

1) Ott was denied his right to equal protection, as guaranteed by the Fourteenth Amendment, due to the Texas Board of Pardons and Paroles' reliance on secret and unverified written and oral protests.

2) The Warden of the Walls Unit of the Texas Department of Criminal Justice, Institutional Division, abrogated Ott's rights to equal protection, as guaranteed by the Fourteenth Amendment, because, acting on behalf of the State of Texas, the Warden selected Ott for differing treatment without a rational basis.

3) Ott's rights to due process, as guaranteed by the Fourteenth Amendment, were abrogated by the Texas Board of Pardons and Paroles' issuance of a parole

same statute the State had fifteen days to answer the application. TEX. CODE CRIM. PROC. ART. 11.07, § 3(b) (1997). No answer was filed by the State, no evidentiary hearing was held, and no findings of fact or conclusions of law were entered by the State District Court. Rather, Ott's state habeas petition was merely sent to the Texas Court of Criminal Appeals. When the undersigned learned of the transmittal of the habeas petition to the Court of Criminal Appeals, a pre-submission brief was filed with that Court pointing out that an evidentiary hearing was necessary due to the allegations in the petition.

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certificate and its subsequent recision of that certificate without notice or a hearing.

4) The prosecutor's actions in reviewing Ott's note pad and refusing to return it to trial counsel, compounded by the trial court's failure to return the note pad to Ott's counsel, violated Ott's rights to present a defense and to testify in his own defense, as said rights are guaranteed by the Sixth and Fourteenth Amendments.

5) The prosecutor's actions in reviewing Ott's note pad and refusing to return it to trial counsel, compounded by the trial court's failure to return the note pad to Ott's counsel, operated to deprive Ott of his right to effective assistance of counsel, as said right is guaranteed by the Sixth and Fourteenth Amendments.

6) The trial court committed reversible error by discharging at least thirty-two veniremen from jury service without the defendant being present, in violation of Ott's rights under the Sixth Amendment.

7) Ott was denied his right to effective assistance of counsel, as said right is guaranteed by the Sixth and Fourteenth Amendments.

The only communication from the Court of Criminal Appeals regarding Ott's writ after the filing of the pre-submission brief was a "white card" sent to Ott and the undersigned counsel. These "white cards," postmarked September 18, 1997, stated only that on September 17, 1997, "the Court ha[d] denied without written order the application for writ of habeas corpus."[4]

The Court of Criminal Appeals' order was dated September 17, 1997 (Wednesday). It was postmarked September 18, 1997 (Thursday), and it was not received by the undersigned until Saturday, September 20, 1997. On Monday, September 22, 1997, the undersigned counsel filed a motion for reconsideration in the Court of Criminal Appeals and simultaneously mailed by overnight service provider (Federal Express) Ott's first (and only) federal writ from counsel's office in Austin to the United States District Court, Southern District, Houston Division, where it was filed on Tuesday, September 23, 1997. The petition was transferred by the Southern District to

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[4] Despite the absence of anything more than the above language, it is clear that the Court of Criminal Appeals could not have based its decision on procedural default because the factual basis for Ott's first six state writ claims (first three federal writ claims) arose after he had presented his only other application for state habeas relief. TEX. CODE CRIM. PROC. ART. 11.07 § 4(a)(1) (1997). The factual basis for Ott's due process, due course of law, and equal protection claims regarding his treatment in the Texas parole system did not arise until February 23, 1990. Additionally, Ott's state claims having to do with the prosecutor's expropriation of the notes he made during trial should have met the requirement of Article 11.07, Section 4(a)(2) that, but for the violations of the constitution alleged, no rational juror would have convicted Ott of murder.

the Eastern District by an order dated September 30, 1997. The Eastern District, Sherman Division, issued an order to show cause on October 24, 1997, recognizing that Ott has raised "one or more factual allegations which, if true, state a cause of action under 28 U.S.C. § 2254."

On January 29, 1998, after receiving two unopposed extensions of time to file a response, Appellee Johnson filed a motion to dismiss based upon the statute of limitations in 28 U.S.C § 2244(d) (1998). The case was assigned by the District Court to a United States Magistrate Judge. The Magistrate Judge issued his Report and Recommendation on March 27, 1998, recommending that Ott's petition be dismissed as beyond the period of limitations. Ott and Appellee Johnson filed Objections to the Magistrate Judge's Report and Recommendation on April 28, 1998, and May 6, 1998, respectively.

The District Court issued a final order and judgment on August 31, 1998, adopting as correct the findings of fact and conclusions of law of the magistrate judge and entering judgment in accordance, dismissing Ott's petition. Ott filed a timely notice of appeal and applied to the District Court for a Certificate of Appealability, raising nine issues.[5] The District Court granted a Certificate of

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[5] The issues were as follows:

1. Ott presented a timely first federal habeas petition because the tolled period included the time Ott was allotted to file for writ of certiorari.

2. Ott presented a timely first federal habeas petition because he met the requirements of 28 U.S.C. § 2244(d) as applied through Rule 6, Federal Rules of Civil Procedure.

Appealability on the issues regarding the limitations period and equitable tolling. App. 3 (Slip Op. at 3).

On appeal to the Fifth Circuit, Ott abandoned his argument that the mail provision in Rule 6(e), Federal Rules of Civil Procedure, extended the limitations period. In addition to the issues granted COA by the District Court, Ott briefed the remaining six issues. 192 F.3d at 512 n.6. The Fifth Circuit panel issued an opinion on October 21, 1999, holding (1) "the period for seeking a petition for certiorari does not toll Ott's limitations period under § 2244(d)(2)"; and (2) equitable tolling was not warranted. App. 6, 8 (Slip Op. at 7, 9). The panel also found that, because Ott had not made "an express request to broaden the COA," it would not consider the other six

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3. Even if the petitioner did not file within the statute of limitations, the statute should be equitably tolled so that the district court can reach the merits of his claims.

4. Denial of review of Ott's first federal habeas corpus petition would violate the Suspension Clause.

5. Denial of review of Ott's first federal habeas corpus petition violates the Due Process Clause.

6. Denial of review of Ott's first federal habeas corpus petition violates the Equal Protection Clause.

7. Denial of review based on the statute of limitations, without any notice, violates the Suspension Clause.

8. Denial of review based on the statute of limitations, without any notice, is repugnant to due process.

9. Denial of review based on the statute of limitations, without any notice, is repugnant to equal protection.

issues for which COA was denied by the District Court. 192 F.3d at 512 n.6. Ott's timely filed motion for panel rehearing was denied without written opinion. App. 9.

By refusing to grant equitable tolling for circumstances that were outside of Petitioner Ott's control, the Fifth Circuit Court of Appeals has denied him merits review of very weighty constitutional issues. Ott has been forced to languish in prison for a decade past his original release date due solely to capricious and arbitrary actions of Texas officials that violated Ott's rights to equal protection and fundamental fairness. The Fifth Circuit's treatment of the issues creates issues of nationwide importance to all current and future habeas applicants.

Indeed, the record reflects that, during that decade, Ott did not "sit on his rights" but diligently sought release from his unjust captivity through Texas parole procedures and a class action suit in federal court. Ott filed his state petition for writ of habeas corpus on the same day that the opinion in the federal suit finally was issued. Ott's attempts through the parole system, the state courts, and the federal class action suit afforded him no relief. His hope of redress for his unjust incarceration has come to lie solely with the instant federal petition brought under 28 U.S.C. § 2254. The lower federal courts, however, have allowed Ott's **ten-year** unjust incarceration to stand by penalizing him for filing his federal petition a **few days** after the limitations period in 28 U.S.C. § 2244 expired – a matter over which he had virtually no control.

If this Court does not grant review of Ott's petition for writ of certiorari, a miscarriage of justice will be allowed to stand.

ARGUMENT

1. **The Fifth Circuit has decided an important question of federal law that has not been, but should be decided by this Court, in finding that 28 U.S.C. § 2244(d)(2) does not include the 90 days in which a state habeas petitioner may file a petition for writ of certiorari to this Court.**

28 U.S.C. § 2244 (d)(2) tolls the statute of limitations during the time when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." Such State post-conviction review should include the ninety days in which a Supreme Court certiorari petition may be filed from the State court decision.

a. **The Fifth Circuit's holding that a petition for writ of certiorari to this Court is not an application for "State" review that would toll the § 2244 limitations period is contrary to the rules of statutory construction as developed by this Court.**

The Fifth Circuit, in the opinion below, finds that, supposedly "unlike § 2244(d)(1)(A), which takes into account the time for filing a certiorari petition in determining the finality of a conviction on direct review, § 2244(d)(2) contains no such provision." App. 5 (Slip Op.

at 6). Section 2244, in fact, contains no explicit reference to petitions for certiorari to this Court. The circuit panel, nevertheless, proceeds to contrast its judicial interpretation of § 2244(d)(1)(A) with § 2244(d)(2) as though it were comparing the words of the statute in each subsection under a rule of statutory construction. *Id.* This leads ultimately to the Court's holding that a petition for writ of certiorari to this Court "is not an application for **'State'** review that would toll the limitations period." *Id.* (citing *Hohn v. United States*, 118 S. Ct. 1969 (1998), for the principle of statutory construction, and *Rhine v. Boone*, 182 F.3d 1153, 1155 (10th Cir. 1999); *United States v. DeTella*, 6 F. Supp. 2d 780 (N.D. Ill. 1998) (holding that the time for seeking certiorari with this Court does not toll the limitations period under § 2244(d)(2)).

By the very same rule of statutory construction, however, the Fifth Circuit's restrictive interpretation of § 2244(d)(2) may be shown to be contrary to Congressional intent. *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). The non-opt-in provision's tolling period, applicable in Ott's case, includes the "time during which a properly filed application for state post-conviction ***or other collateral review*** . . . is pending." 28 U.S.C. § 2244(d)(2) (emphasis added). The opt-in provision, in contrast, terminates its analogous tolling period for state post-conviction relief upon "the final ***State court disposition*** of such petition." 28 U.S.C. § 2263 (b)(2) (emphasis added). "Given the opt-in provision's clear exclusion of

federal (*i.e.*, Supreme Court) *certiorari* review from the tolling period, the omission of similar language from the non-opt-in provision indicates that Congress did not intend to impose a similar limitation on the non-opt-in tolling mechanism." JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.1b (1999). As surely as Section 2244(d)(1)(A), Section 2244(d)(2) embraces non-"State" review, e.g., a petition for writ of certiorari to this Court.

b. Judicial interpretation is required, absent clear statutory language or Congressional intent, to find that the 90-day period for filing a certiorari petition to this Court tolls the statute on either direct or collateral review.

It is now undisputed in the lower federal courts that the statute of limitations in § 2244(d) is tolled for the 90-day period in which a state inmate *could* apply for writ of certiorari to this Court on "direct review." *See Flanagan v. Johnson*, 154 F.3d 196 (5th Cir. 1998); *Smith v. Bowersox*, 159 F.3d 345 (8th Cir. 1998); *Albert v. Strack*, 1998 U.S. Dist. LEXIS 129 at *13 (S.D.N.Y. Jan. 13, 1998). The language of the statute does not compel the courts' finding that "direct review" includes federal certiorari review. Rather, this finding is a logically necessary interpretation enabling the statute to function. Without it, the period in which a case might be on certiorari review could wipe out the statutory limitations period.[6] *In Albert*, the U.S.

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[6] § 2244(d)(1)(A) does not state that the limitations period is tolled until "the expiration of the time for seeking [certiorari] review." Quite to the contrary, the statutory language "such

District Court for the Southern District of New York elucidated this situation:

> The plain language of 28 U.S.C. § 2244(d)(1)(A) refers to the expiration of the time for "direct review," and it is indisputable that direct review includes review by certiorari to the United States Supreme Court. Logically, under the Respondent's reading, the one-year statute of limitations clock would apparently begin running even if the Supreme Court granted certiorari, unless the Respondent would wrench the statutory language even further to consider Supreme Court review as "collateral" for tolling purposes under § 2244(d)(2).

Albert, supra, at *13.

The courts must only assume that certiorari review is within the purview of § 2244, for either direct or collateral purposes. It does not follow, therefore, that the statutory language construed by the Fifth Circuit to drive a wedge between direct and collateral application is controlling on the issue whether the period must be tolled

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review" refers immediately to "direct review." "Direct review" remains undefined in the statute. The statute does not address the inclusion of certiorari review, or application to the Supreme Court for certiorari review. States are not constitutionally required to have any direct review process. They are not obligated to have mandatory direct review of even capital cases. Non-capital cases are subject only to discretionary review in most, if not all, states. Certiorari to the U.S. Supreme Court can be waived in all circumstances. The language of the statute does not compel the conclusion that Congress meant for "expiration of time" to include the time for possible application for certiorari review.

for the time that a petitioner *could* apply for post-conviction certiorari review. App. 6 (Slip Op. at 6) (holding that "State" modifies "other collateral review"). The Congressional restriction that tolling applies for "properly filed" post-conviction petitions only means that the statute will continue to run after the conclusion of direct review when a petitioner's pending post-conviction filing(s) have not comported with procedural requirements of time, place, or manner. *Hughes v. Irvin*, 967 F. Supp. 775, 778 (E.D. N.Y. 1997) (holding that "properly filed" in § 2244(d)(2) means that "in order to trigger the tolling mechanism, a petitioner's collateral review application must be submitted in accordance with any applicable procedural requirements, such as notice to the respondent, correct place of filing, and timeliness of the motion"). The "properly filed" terminology distinguishes post-conviction collateral review from direct review only because direct review is in fact required in essentially every jurisdiction. Nothing in the statute leads to the conclusion that, once a state collateral petition has been "properly filed" and ruled upon by the highest state court, the limitations period may not also be considered tolled during the 90 days allotted by Supreme Court Rule 13.

c. Interpretative consistency should require that the time during which "other collateral review . . . is pending" include the limited period (90 days under Supreme Court Rule 13) when a petitioner could seek a writ of certiorari from a state post-conviction judgment.

For equitable reasons, the term "properly filed" in 28 U.S.C. § 2244(d)(2) should not exclude consideration of

time in which a pleading could be filed, such as a certiorari petition to this Court. Given that statutes of limitation should be interpreted so as not arbitrarily to cut off a petitioner's opportunity to seek habeas relief in the federal courts, once it is determined that the time allotted for seeking certiorari review applies to § 2244(d)(1)(A), it is arbitrary to refuse to find the same in regard to § 2244(d)(2).

Although a state habeas petitioner need not file a petition for writ of certiorari in order to exhaust State remedies, this Court's certiorari review is an aspect of the State post-conviction process. *See* LIEBMAN & HERTZ, *supra*, at § 6.4 (1994) (section on U.S. Supreme Court certiorari review in chapter on "State Postconviction Remedies"); *contra* App. 6 (Slip Op. at 6). Courts have found, in the context of § 2244(d)(2), that a certiorari petition to this Court, once filed, tolls the statute of limitations. *E.g.*, *United States v. DeTella*, 6 F. Supp. 2d 780, 782 (N.D. Ill. 1998) (holding that because petitioner "did not actually file a petition for certiorari with the Supreme Court, his post-conviction was no longer 'pending' for the purposes of § 2244(d)(2)").[7]

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[7] The district court in *DeTella* also held, ambiguously, that under 28 U.S.C. § 2244(d)(2), the statute of limitations is tolled only when a petition is "pending," and interpreted "pending" to mean "while review of [the] denial [of a state post-conviction petition] is pending before a state court." *DeTella*, 6 F. Supp. 2d at 782. The bottom line of the Court's interpretation seems to be that, for it, "pending" means that a petition is actually on file either in the state post-conviction system or on writ for certiorari to this Court. The same court found no cases directly discussing the meaning of "pending" as it is used in § 2244(d)(2). *Id.* at 782.

When Congress elects to use terminology that has become commonplace in court decisions in a particular field of law, the rules of statutory construction call for defining the statute's terms in accordance with that accepted judicial meaning. LIEBMAN & HERTZ, *supra*, at § 5.1b (citing *Evans v. United States*, 504 U.S. 255, 260 & n.3 (1992)). This Court routinely uses the word "pending" to refer to the time for filing of a petition for writ of certiorari. *United States Postal Service v. National Association of Letter Carriers, AFL-CIO*, 481 U.S. 1301, 1302 (1987) (Rehnquist, Circuit Justice) (granting application for stay of mandate "pending the filing and disposition of a petition for certiorari"); *Williams v. Missouri*, 463 U.S. 1301, 1301 (1983) (Blackmun, Circuit Justice) (movant seeking "stay of execution pending timely filing and disposition" of certiorari petition on direct review); *White v. Florida*, 458 U.S. 1301, 1301 (1982) (Powell, Circuit Justice) (movant seeking to stay mandate "pending filing and disposition of his petition for a writ of certiorari"); *Baldwin v. Maggio*, 715 F.2d 152 (5th Cir. 1983) (determining whether to stay own mandate "pending" the filing of a writ of certiorari); *Smith v. Balkom*, 677 F.2d 20, 21 (5th Cir.), *cert. denied*, 459 U.S. 882 (1982) (same).

A number of federal district courts have held that "pending" must include the time in which a petitioner **could seek** appeals from a post-conviction decision within the State system. The logic of these opinions must also apply to the petition for writ of certiorari at the end of the State collateral review process. *Neal v. Ahitow*, 8 F. Supp. 2d 1117, 1119 (C.D. Ill. 1998) (quoting and relying, in part, on *Deerwester v. Carter*, No. 97-CV-1428 (C.D. Ill. May, 20, 1998)). These courts determine that Congress'

use of "pending" not only is ***ambiguous***, but also must not be restricted to mean only the period of time that a state application is before a state court. In *Neal*, the Court observed:

> [I]f Congress intended . . . it may have stated . . . that the time period that the State provides for post-conviction review shall not be counted toward any period of limitation. But Congress did not do so. Rather, section 2244(d)(2) requires that the petition for post-conviction relief be properly filed and pending before the limitations period will be tolled. Once a state trial court dismisses a post-conviction relief petition, how can it be said that the petition is filed? Even more troublesome, how can it be said that the petition is pending?

Neal, 8 F. Supp. 2d at 1118-19. The *Neal* Court noted the *Deerwester* Court's findings that "pending" is ambiguous, because "[i]t is not always used in the most technical sense to describe a matter that is before a court awaiting action." *Id.* (quoting *Deerwester*, 97-CV-1428, Doc. #18 at p. 4-5). The *Deerwester* Court observed that Black's Law Dictionary defines "pending" as "awaiting an occurrence or conclusion of an action," and states that "an action or suit is 'pending' from its inception until the rendition of final judgment." *Id.* (quoting *Deerwester*, citing BLACK'S LAW DICTIONARY, 6TH ED., p. 1134 (1990)). The *Deerwester* Court added that "pending" included the period of time following a final judgment during which there might be possibility of appeal. *Id.* (quoting *Deerwester*, citing *United States v. Owen*, 20 C.M.R. 182 (1955)). On the basis of these findings, the *Deerwester* Court held that an action was pending "until a final judgment is rendered and appeal or

reconsideration is no longer an option." *Id.* (quoting *Deerwester*).

The *Neal* Court adopted the *Deerwester* Court's holding, because "any other reading of the section" would leave § 2254 petitioners in a Catch-22 situation:

> [A] post-conviction petition is properly considered "pending" while review of its denial is pending before a state court. Otherwise, a "Catch-22" situation could arise where an inmate would be forced either to allow the statute of limitations to expire, which would prevent habeas relief, or to file his habeas petition before exhausting his state court remedies, which would result in the dismissal of his habeas petition as premature for failure to exhaust state remedies.

Id. (quoting *Gonzalez v. Detella*, 918 F. Supp. 1214 (N.D. Ill. 1998)). The *Neal* Court expressed concern over the consistency of its opinion with Congress' intent to expedite the habeas process, but found the alternative confusion and denial of access to habeas petitioners more unacceptable. *Id.*

Interpretative consistency would require that the time during which "other collateral review . . . is pending" include the limited period (90 days under Supreme Court Rule 13) when a petitioner could seek a writ of certiorari from a state post-conviction judgment. Given the fact that "pending," when applied to petitions for certiorari, may refer to the time for filing as well as the actual filing of a petition, sections 2244(d)(1)(A) (direct review) and 2244(d)(2) (collateral review) are clearly parallel, not contrasting on the issue of actual filing. The

language of the statute most easily lends itself to the interpretation that "properly filed" modifies an application for State post-conviction review, not other collateral review. The statute, very pointedly, does **not read** "the time during which **properly filed application[s]** . . . ***[are] pending,***" nor "the time during which a properly filed state post-conviction application or properly filed application for other collateral review is pending." If Congress had intended to embrace within the tolling statute only those state appeals from post-conviction judgments or Supreme Court certiorari petitions that were actually filed, it would have referred to "application[s]" in the plural or repeated "properly filed."

"Pending" embraces the period of collateral review allowed within the state system, and must also embrace the period allowed by Supreme Court Rule 13 to apply for certiorari review. Otherwise, "pending" would be arbitrarily subject to two different interpretations, allowing for tolling on the state level, as per *Neal* and *Deerwester, supra,* for the period of time an appeal might be taken from a trial court post-conviction judgment, while prohibiting tolling on the Supreme Court certiorari level. The language of the statute and history of usage of the term "pending" as relating to Supreme Court certiorari review permits tolling for the period of time allotted in Supreme Court Rule 13.[8]

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[8] Respondent Johnson did not raise his statute of limitations defense with "clean hands." Rather, he obtained two unopposed extensions of time before filing his Answer, allowing the 90 day period for filing a petition for writ of certiorari to expire before objecting on the grounds that "pending" should refer only to filed petitions. This was after Ott

2. The Fifth Circuit's decision is inconsistent with its own authority and other circuits' "equitable tolling" decisions in holding that failure to file within the limitations period was attributable to the petitioner when, but for a Court's irregular procedure, filing would have been timely.

Equitable tolling should be available to Ott, because the Court of Criminal Appeals' "white card" order was an event beyond his control which caused him to have to file a late federal petition. *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999); *Calderon v. Beeler*, 128 F.3d 1283, 1289 (9th Cir.), *cert. denied*, 118 S. Ct. 1389 (1998); *Davis v. Johnson*, 158 F.3d 806, 811-12 (5th Cir. 1998); *United States v. Williams*, 1998 U.S. Dist. LEXIS 15766 (N.D. Ill. Sept. 23, 1998); *Parker v. Bowersox*, 975 F. Supp. 1251 (W.D. Mo. 1997). No case for equitable tolling will be exactly like another. The case law, however, reflects a general principle: that state action delaying the filing of a petition should not be allowed to diminish time in the petitioner's limitations period. *Prunty*, 187 F.3d at 1107. In *Williams*, delay by the federal judge in granting an in forma pauperis petition was not allowed to prevent federal review. *Williams*, 1998 U.S. Dist. LEXIS 15766, at *4-*5. In *Parker*,

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had made it clear that he knew he could toll the statute by actually filing an application for writ of certiorari, but chose not to so as to avoid needlessly creating additional work for this Court since certiorari from the Court of Criminal Appeals' "white card" denial would undoubtedly be a needless consumption of this Court's resources. Moreover, it would be inequitable and burdensome on the system to require petitioners to actually file petitions for writ of certiorari merely to preserve their right to file a federal petition for writ of habeas corpus.

the mail-box rule of *Houston v. Lack*, 487 U.S. 266 (1988), was applied to the limitation statute, allowing equitable tolling when a *pro se* petitioner timely submitted his application for mailing by prison authorities, who then kept his mail from being processed until the deadline of the "grace period." *Parker*, 975 F. Supp. at 1253 (holding that "something outside" the prisoner's "control" kept his mail from being processed until April 24, when he otherwise would have had his petition at the court before the April 23 deadline); *accord Prunty, supra.*

The "white card" order caused the statute to run before Ott received, or could have received without extraordinary effort, **any notice** that his case was no longer lodged in the Court of Criminal Appeals. *See* 28 U.S.C. § 2244(d)(2). Under normal circumstances not involving a "white card" order, Ott would not have faced any possible forfeiture of federal habeas review, because the case would have been filed and set for submission in the Court of Criminal Appeals, giving him the right to file a motion for rehearing in state court. TEX. R. APP. PROC. 213(b) (1997) (TEX. R. APP. PROC. 79.2(d) (1998)). The "white card" denial not only took Ott by unfair surprise, but prevented him from having the right to move for rehearing under state law so as to preserve his opportunity for federal review. Ott filed a motion for rehearing anyway on September 22nd, invoking the Court of Criminal Appeals' ability to reconsider the decision on its own motion. *Id.* (providing that no motions for rehearing or reconsideration will be considered from denial of relief if the case was not docketed, but that the court can reconsider its decision on its own motion). Ott's motion for

rehearing was rejected by the Court of Criminal Appeals as unauthorized on the following day, September 23rd.

One of the basic questions involved in equitable tolling is whether the petitioner "slept on his rights." *Perez v. United States*, 167 F.2d 913, 917-18 (5th Cir. 1999) (quoting *Burnett v. New York*, 380 U.S. 424, 429 (1965)). This Court has observed that a petitioner does not sleep on his rights when he brings an action within the period of the statute of limitations. *Burnett*, 380 U.S. at 429. The limitation period is then tolled until a state court order dismissing the state action becomes final. *Id.* at 435. However long Ott's claims may have been presentable, he did not sleep on his rights, but filed his state action within the one-year limitations period. When Ott's state action was denied, he did not sleep on his rights, but filed his federal petition on the second business day after the state court notified him of its decision. *See Coleman v. Johnson*, 184 F.3d 398, 403 (5th Cir. 1999) (holding that, because the petitioner "does not explain the six-month delay between being notified about his state application and filing his federal petition, . . . his circumstance is not extraordinary enough to qualify for equitable tolling"). Had Ott successfully filed his federal petition the day after the Court of Criminal Appeals issued its "white card" denial, he would have been afforded federal review. When Ott actually received notice that his state petition was denied, he very expediently transmitted his federal writ on the first business day after having received notice, with the petition being filed on the second business day after notice. Since the method by which the state court disposed of Ott's claims was unusual, Ott's diligent post-notice response should allow equitable tolling.

Sleeping on one's rights differs from dilatory filing under Rule 9 (a), Rules Governing Section 2254 Cases in the United States District Courts. A petitioner does not sleep on his rights when his counsel files his state petition within time to toll the statute of limitations. *Burnett, supra.* Arguably, he does not sleep on his rights when counsel federal expresses the federal petition for filing **immediately** upon learning of the state court's action. The Fifth Circuit's focus on the amount of time that passed prior to Ott's filing of his second state post-conviction petition, which might assist a Rule 9 analysis, is irrelevant to equitable tolling.[9] App. at 8 (Slip Op. at 8). All that matters for equitable tolling purposes, as opposed to a Rule 9 analysis, is that Ott filed his state petition before the federal statute of limitations period had run. Once that was accomplished, the question became whether Ott slept on his rights in filing the federal petition after receiving notice of denial in the state action. *Coleman, supra.* Ott very promptly filed the federal petition. The Fifth Circuit would now penalize Ott for filing, by the broadest interpretation in favor of Respondent, a federal petition **four days late**, while another panel of the same circuit court granted equitable tolling in a case in which a petitioner's counsel's **unreasonable** reliance upon a court, in part, and his own gross negligence, caused him to file the federal petition over a year after the limitations period had run. *Davis v. Johnson*, 158 F.3d 806, 810-11 (5th Cir. 1998).

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[9] It is also inaccurate, charging that Ott failed to challenge parole board actions until 15 years after the conviction became final. App. 8 (Slip Op. at 8).

Although circumstances relevant to equitable tolling vary from case to case, the Fifth Circuit's treatment of Ott cannot be squared with its treatment in *Davis*. *Davis* is a death penalty case, but Ott's claims to deprivation of equal protection and due process causing him to remain unjustly incarcerated for almost a decade (at this point) are serious and compelling. Ott's substantive claims, furthermore, are equally if not more compelling than Davis', and Ott has received **no meaningful review** of those claims in state or federal court.

3. By denying Ott review of six claims that were not granted Certificate of Appealability by the District Court, but which were briefed in the appellate brief, the Fifth Circuit entered a decision in conflict with other Circuit courts.

Following Rule 22, Federal Rules of Appellate Procedure, the circuit courts have recognized a constructive request for COA where the district court has refused to certify all of the issues the petitioner has presented for collateral review. *E.g.*, *United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). Some circuit courts consistently apply this rule to appeals in which the district court granted COA for some, but not all, issues, if the appellant has made "at least an implicit request for review by briefing the issues denied certification." *Kimler*, 150 F.3d at 431 & 431 n.1 (citing *Kincade v. Sparkman*, 117 F.3d 949, 953 (6th Cir. 1997); *Porter v. Gramley*, 112 F.3d 1308, 1312 (7th Cir. 1997); *United States v. Smith*, 1997 WL 542293 (9th Cir. 1997) (unpublished opinion)); *see also Green v. United States*, 172 F.3d 53, 1998 WL 879513, at **1 n.1 (7th Cir. 1998) (unpublished disposition).

The Fifth Circuit procedures for expanding COA are unclear. There are no written rules concerning such expansion. The relevant opinions, however, suggest that the Appellant must make some kind of formal request regarding each issue sought to be included. App. 4 (Slip Op. at 4-5 n.6) (citing *Kimler*).

The district court granted COA "limited to petitioner's **claim** regarding limitations and equitable tolling." Certificate as to Appealability, October 12, 1998 (emphasis added). Ott had raised nine issues in his Motion for Certificate of Appealability, all of which pertained to the limitations bar raised by the district court. The district court's language in its COA order easily could have been construed as treating all the issues as Ott's "claim." The district court's Order, by omitting to refer explicitly to the excluded issues, was ambiguous in itself.

The additional issues to which the Fifth Circuit refers in footnote 6 initially were raised by Ott in response to the district court's order dismissing Ott's petition as outside the statute of limitations in 28 U.S.C. § 2244(d). *See* Response To This Court's Order of January 30, 1998, And Respondent's Motion To Dismiss, filed in the district court on February 24, 1998. The Magistrate (in his Findings, Conclusions, and Recommendation) and the district court (in its subsequent Order) simply ignored these six points. The seriousness of these unaddressed issues, which challenge the denial of federal review of Ott's first petition as violating the Suspension Clause, due process, and equal protection (*see* footnote 5, *supra*), certainly is

enhanced by the outrageous violations of equal protection and due process in Ott's underlying claims pertaining to the parole process.

Out of excess of caution, Ott noted in his original appeal brief to the Fifth Circuit that the issues had been raised by him, but had not been addressed by the district court. Brief of Appellant at 28. Ott then briefed the issues on appeal. This should have been sufficient notice to the Court of Appeals that Ott wanted those issues considered. In light of (1) the vagueness of the district court's order on the extent of its COA grant and (2) the lack of any clear circuit guidelines for expanding issues beyond those granted COA by the district court, the Court of Appeals should have reviewed the issues in fairness to Ott.

This Court should grant review on this question, so as to assure consistency among the circuits and lack of confusion for petitioners who, in circumstances like those of Ott, wish to avail themselves of their statutory and rule based right to seek COA from the circuit court. 28 U.S.C. § 2253(c); FED. R. APP. PROC. 22.

CONCLUSION

The petition for writ of certiorari should be granted to address these issues of nationwide significance.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-41211

GREGORY ARTHUR OTT,

Petitioner-Appellant,

versus

GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
For the Eastern District of Texas

(Filed Oct. 21, 1999)

Before POLITZ, DAVIS, and STEWART, Circuit Judges.

POLITZ, Circuit Judge:

Texas inmate Gregory Arthur Ott appeals the district court's denial of his habeas corpus petition under 28 U.S.C. § 2254. For the reasons assigned, we affirm.

BACKGROUND

In 1978, Ott was convicted of murdering a Texas Ranger and was sentenced to life imprisonment. This conviction was affirmed on direct appeal and became

final in July 1982.[1] On April 23, 1997, Ott, represented by counsel, filed a state habeas corpus application, challenging issues relating to the rescission of his parole certificate and the validity of his conviction.[2] On September 17, 1997, the Texas Court of Criminal Appeals denied the application without written order.

On Tuesday, September 23, 1997, Ott, represented by counsel, filed a § 2254 petition raising the same issues as in the state habeas application. Counsel stated that on the prior Saturday, September 20, 1997, he received a "white card" from the Texas Court of Criminal Appeals postmarked September 18, 1997, noting that Ott's habeas application had been denied. Counsel stated that he mailed the § 2254 application for filing on Monday, September 22, 1997, the next business day after receiving notification.

Adopting a report and recommendation by the magistrate judge, the district court found that Ott had until April 24, 1997 to timely file a § 2254 application and that the filing of the state court action on April 23, 1997 tolled the period for one day. The court determined that the filing on September 23, 1997, after the denial of the state application on September 17, 1997, was untimely. It also rejected Ott's argument that the limitations period should

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[1] *See* ***Ott v. State***, 627 S.W. 2d 218 (Tex. App. 1981, pet. ref'd).

[2] The April 1997 habeas petition was actually the second state habeas application. The first state habeas action was filed in 1989. That habeas petition, which raised different issues from the present petition, is not in the record and is not relevant to the disposition of this case.

be tolled during the time allotted to seek a petition for certiorari from the denial of his state habeas application. Finally, the district court determined that equitable tolling should not apply in this case as Ott had waited nineteen years before bringing his claims.

After dismissing his petition as time-barred, the district court granted a certificate of appealability ("COA") limited to the issues regarding the limitations period and equitable tolling.

ANALYSIS

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), there is a one-year limitations period for filing a writ of habeas corpus by a person in state custody. Under 28 U.S.C. § 2244(d)(1)(A), the limitations period commences from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."[3] Moreover, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2).

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[3] Although § 2244(d)(1) lists three other alternative events from which the limitations period would begin, Ott agrees that the date of final judgment in § 2244(d)(1)(A) is the only applicable provision here.

For convictions final before the effective date of the AEDPA, we have applied a one-year grace period allowing habeas petitioners until April 24, 1997 to file their claims.[4] As noted, however, under § 2244(d)(2) the time between Ott's filing of his state habeas application and its denial does not count against the one-year limitations period.

Ott filed his state habeas application on April 23, 1997, one day before the expiration of the grace period. The limitations period expired on Friday, September 19, 1997, one day after the Texas Court of Criminal Appeals denied the habeas application on September 18, 1997.[5] Ott asserts two bases that would prevent his September 23, 1997 application from being deemed untimely filed. First, he contends that the ninety days in which a state habeas petitioner may petition the United States Supreme Court for a writ of certiorari, even if no petition for certiorari is filed, should toll the limitations period. Second, he asserts that the limitations period in this case should be extended by the doctrine of equitable tolling.[6]

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[4] **Flanagan v. Johnson**, 154 F.3d 196 (5th Cir. 1998).

[5] On appeal, Ott abandons the argument made in the district court that the three-day allowance for acts conducted by mail, *see* Fed. R. Civ. P. 6(e), extended the limitations period.

[6] We note that although Ott has briefed six issues concerning the suspension, equal protection, and due process clauses of the constitution, these issues were not included in the COA granted by the district court. Even though Ott has briefed the issues, he has not explicitly requested that we broaden the district court's COA. Without an express request to broaden the COA, one which we approved, we will not consider issues on which a COA was denied. *See* ***United States v. Kimler***, 150 F.3d 429 (5th Cir. 1998).

I

Ott first contends that § 2244(d)(2), which tolls the limitations period while a "properly filed application for State post-conviction or other collateral review" is pending, includes the ninety days in which a state habeas petitioner may file a petition for writ of certiorari with the United States Supreme Court. He maintains that expiration of the limitations period prior to the time in which he could seek Supreme Court review would unfairly penalize those who desire to petition for certiorari. We review this question of statutory construction *de novo*.[7]

We have not previously had an opportunity to consider this issue. We now reject same. We agree with our colleagues in the Tenth Circuit that § 2244(d)(2) does not toll the limitations period from the time of denial of state habeas relief by the state high court until the time in which a petitioner could have petitioned the United States Supreme Court for certiorari.[8]

First, unlike § 2244(d)(1)(A), which takes into account the time for filing a certiorari petition in determining the finality of a conviction on direct review, § 2244(d)(2) contains no such provision. Rather, § 2244(d)(2) only tolls the period for a properly filed petition for "State post-conviction or other collateral review." It is a fundamental tenet of statutory construction that Congress intended to

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[7] *See* ***United States v. Fitch***, 137 F.3d 277 (5th Cir. 1998).

[8] *See* ***Rhine v. Boone***, No. 98-6353, 1999 WL 459312, at * 2-3 (10th Cir. July 7, 1999). *See also* ***United States v. DeTella***, 6 F. Supp. 2d 780 (N.D. Ill. 1998) (holding that time for seeking certiorari with Supreme Court does not toll limitations period under § 2244(d)(2)).

exclude language included in one section of a statute, but omitted from another section.[9] We conclude and hold that a petition for writ of certiorari to the Supreme Court is not an application for "State" review that would toll the limitations period.[10]

Second, we also note that judicial efficiency does not require a petitioner to begin federal habeas proceedings until the state conviction becomes final upon direct review, which occurs upon denial of certiorari by the Supreme Court or expiration of the period for seeking certiorari. For state post-conviction proceedings, however, the post-conviction application becomes final after a decision by the state's high court. Requesting relief from the Supreme Court is not necessary for prosecuting state habeas relief and is irrelevant to federal habeas jurisdiction. Thus, unlike direct review, there is no judicial interest in habeas proceedings for tolling the limitations period for Supreme Court certiorari petitions.[11] Accordingly, the period for seeking a petition for certiorari does not toll Ott's limitations period under § 2244(d)(2).

II

Ott next maintains that the doctrine of equitable tolling should extend the limitations period. We have held that the AEDPA's limitations period is not jurisdictional,

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[9] **Hohn v. United States**, 118 S. Ct. 1969 (1998).

[10] *See* ***Rhine***, 1999 WL 459312, at * 3 (holding that "State" modifies both the phrase "post-conviction review" and the phrase "other collateral review").

[11] *See* ***id.***

but is subject to equitable tolling principles.[12] We review the district court's decision not to invoke the doctrine of equitable tolling for abuse of discretion.[13]

Although cautious not to apply the statute of limitations too harshly, we recognize that the equitable tolling doctrine is to be applied only if the relevant facts present sufficiently "rare and exceptional circumstances" that would warrant application of the doctrine.[14] We recently explained that equitable tolling "applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights," and noted that "excusable neglect" does not support equitable tolling.[15]

Ott contends that it would be inequitable to apply the limitations period because he mailed his federal habeas petition for filing on the first business day after receiving notice of the denial of the state application. Moreover, Ott asserts that Texas created an impediment to the timely filing of his petition by its notification of habeas denials through mailed postcards.

We find no error in the district court's decision not to apply the doctrine of equitable tolling to the facts of this case. Ott was represented by counsel for both his state

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[12] **Davis v. Johnson**, 158 F.3d 806 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1474 (1999).

[13] **Fisher v. Johnson**, 174 F.3d 710 (5th Cir. 1999).

[14] **Davis**, 158 F. 3d at 811.

[15] **Coleman v. Johnson**, No. 98-10394, 1999 WL 598607, at * 4 (5th Cir. Aug. 3, 1999) (quoting **Rashidi v. America President Lines**, 96 F.3d 124, 128 (5th Cir. 1996)).

and federal habeas applications. As the district court noted, Ott did not challenge the parole board's actions until some nineteen years after the underlying conviction and fifteen years after the conviction became final. Further, we underscore that the state habeas application was not filed until one day before the expiration of the AEDPA's one-year grace period, an action that necessarily mandated a swift filing of the federal habeas application following the denial of the state petition. This was a matter totally within the control of Ott. The state application readily could have been filed a few days earlier, allowing an adequate period for the filing of the federal petition after final denial of the state application. Accordingly, we find that these are not "rare and exceptional" circumstances in which equitable tolling is warranted.

Because Ott's federal habeas corpus petition was not timely filed and because equitable tolling does not apply in this case, the judgment appealed is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-41211

GREGORY OTT

Petitioner – Appellant

v.

GARY L JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

Respondent – Appellee

Appeal from the United States District Court
for the Eastern District of Texas, Sherman

ON PETITION FOR REHEARING

(Filed Dec. 3, 1999)

Before POLITZ, DAVIS and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

GREGORY ARTHUR OTT,

Petitioner,

v.

GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

On Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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11 pp

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

GREGORY ARTHUR OTT	§	
VS.	§	CIVIL ACTION NO.
	§	4:97cv301
DIRECTOR, TDCJ-ID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

(Filed Apr. 14, 1998)

Petitioner Gregory Arthur Ott, an inmate confined to the Texas Department of Criminal Justice, Institutional Division, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The case was referred pursuant to 28 U.S.C. § 636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge, for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Discussion

Petitioner is serving a life sentence for the murder of a Texas Ranger in Denton County. Presently pending before the court is respondent's motion to dismiss pursuant to 28 U.S.C. § 2244.

Petitioner, proceeding through present counsel, filed his state application for writ of habeas corpus on April 23, 1997, nearly nineteen years after being convicted. The

Texas Court of Criminal Appeals denied the application without written order on September 17, 1997. Petitioner filed the present petition on September 23, 1997.

The respondent's motion relies upon the circuit decisions which require the petitioner to file his petition on or before April 23, 1997, in order to be considered timely. *See Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc), *rev'd on other grounds*, ___ U.S. ___, 117 S.Ct. 2059 (1997); *United States v. Simmonds*, 111 F.3d 737, 746 (10th Cir. 1997); *Calderon v. United States Dist. Court for the Cent. Dist. of Cal.*, 128 F.3d 1283, 1286-1287 (9th Cir. 1997). The Seventh, Ninth and Tenth Circuits held that a petitioner is allowed to file a timely petition if it is filed before April 24, 1997. Thus, the last day to file a timely petition would be April 23, 1997. More recently, the Third Circuit has joined the sister circuits in holding that the last date for filing a timely petition would be April 23, 1997. *Burns v. Morton*, 134 F.3d 109, 111 (3rd Cir. 1998).

Petitioner recognized a conflict between these circuit decisions and FED. R. CIV. P. 6(a), which provides;

> In computing any period of time prescribed by . . . any applicable statute, the day of the act, event, or default from which the designated period of time begins to run *shall not* be included. (emphasis added)

Rule 6(a) further provides that when the last day falls on a Saturday, Sunday or legal holiday, that day shall not count. Rule 6(e) provides the party an additional three days if the notice is submitted by mail.

The conflict between the circuits and Rule 6 has been argued previously before the Tenth Circuit. In *United*

States v. Hutchinson, No. 97-6359 and *United States v. Williams*, 97-6264 both 1998 WL 94600 unpublished opinion (10th Cir. March 5, 1998). The Tenth Circuit came to the conclusion that *Simmonds* was controlling and denied two motions to vacate as untimely because they were filed on April 24, 1997. The unpublished opinion cites a "well established rule" of excluding the date the event occurred. However, Rule 6 is something more than a well established rule, it is the means by which limitations are to be calculated. As petitioner notes, Rule 6 is used in calculating federal limitations periods when borrowing state limitations periods. *Merriweather v. City of Memphis*, 107 F.3d 396, 398 (6th Cir. 1997). However, every circuit opinion that has reviewed this issue has failed to look at the plain language of Rule 6. Absent controlling precedent from the Fifth Circuit, this court will apply Rule 6 to the limitations period found in 28 U.S.C. § 2244 to determine if the current petition should be dismissed as time barred.

Rule 6(a) allows that the last day to file the petition would be April 24, 1997, which is one year after April 24, 1996, excluding the day the AEDPA took effect. Petitioner filed his state application on April 23, 1997, one day before limitations expired. Thus, petitioner had one day left on his limitations period.

Petitioner's state application tolled limitations pursuant to 28 U.S.C. § 2244(d)(2). The petition was denied September 17, 1997, and the denial was mailed to the petitioner. The mail provision of Rule 6(e) would allow a timely petition to be filed on or before September 21,

1997.[1] Because September 21, 1997 was Sunday, Rule 6 allows that the petition would be timely if filed on the following day September 22, 1997.[2] The petition was filed on September 23, 1997.

Petitioner asserts that the one year limitations should be tolled further by equitable tolling or the ninety days he would be allowed to file a petition for writ of certiorari in the Supreme Court. *See* SUPREME COURT RULES Rule 13(1). Petitioner cites an unpublished case from the Southern District of New York which allegedly would allow a ninety day tolling on direct review. In *Albert v. Strack*, 97cv2978 (SS) 1998 Lexis 129 (S.D.N.Y. January 13, 1998) petitioner filed his petition on April 14, 1997, within the one year limitations period as determined by at least four circuits. However, the Second Circuit has established a "reasonable time" provision pursuant to *Peterson v. Demskie*, 107 F.3d 92, 93 (2nd Cir. 1997).[3] The District Court interpreted the "reasonable time" holding in accordance with *Peterson* and found that petitioner had a reasonable time to file the petition. The petition was dismissed as untimely.[4] The provision cited for a 90 day

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[1] Petitioner received the notice from the Texas Court of Criminal Appeals on September 20, 1997.

[2] Petitioner asserts that Saturday and Sunday should be excluded. However, this is not supported by the plain language of Rule 6.

[3] *Peterson* is not consistent with the Supreme Court's decision in *Lindh* and is of questionable value because it was decided several months prior to the Supreme Court's decision in *Lindh*.

[4] This court does not agree with the holding in *Albert*. As previously stated, the petition, absent a retroactive application, would have been timely if filed by April 24, 1997.

extension by the district court is 28 U.S.C. § 2244(d)(1)(A) which allows limitations [sic] begin at the conclusion of a direct review *or the expiration of the time for seeking such review.* Petitioner asserts this provision should apply to state collateral proceedings tolled by 28 U.S.C. § 2244(d)(2). The wording of this provision does not support such a conclusion. This provision allows tolling only for the time in which "a properly filed application for State post-conviction or other collateral review . . . is pending." If the court considered the time in which a petitioner could file a state application or could file a petition for certiorari from the denial of the application, the limitations provision would become meaningless. Thus, the time that an action could be taken during collateral review cannot be considered in tolling limitations.

Petitioner asserts he is entitled to equitable tolling. The Ninth Circuit has repeatedly allowed equitable tolling of the limitations period based upon the limitations period not restricting the jurisdiction of the court. *See Calderon v. U.S. Dist. Ct. for Cent. Dist. of Cal,* 128 F.3d 1283 (9th Cir. 1997), *cert. denied,* ___ U.S. ___, 118 S.Ct. 899 (1998); *Calderon v. U.S. Dist. Ct. for Cent. Dist. of Cal.,* 127 F.3d 782 (9th Cir. 1997). In reviewing petitioner's current pleadings, this court declines to recommend that equitable tolling be considered in this matter given the date of the conviction and the proceedings that have occurred over the past nineteen years. Petitioner has not offered any compelling circumstances that would require tolling.

Petitioner is outside the statute of limitations by one day and the present petition should be dismissed as untimely.

Recommendation

The petition for a writ of habeas corpus should be dismissed as beyond limitations.

Objections

Within ten (10) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C).

Failure to file written objections to the proposed findings and recommendations contained within this report within ten days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings and recommendations and from appellate review of factual findings and legal conclusions accepted or adopted by the district court except on grounds of plain error. *Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996).

SIGNED this 27th day of March, 1998.

/s/ Robert Faulkner
ROBERT W. FAULKNER
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

GREGORY ARTHUR OTT	§	
VS.	§	CIVIL ACTION NO.
	§	4:97cv301
DIRECTOR, TDCJ-ID	§	

MEMORANDUM ORDER REVIEWING OBJECTIONS AND ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

(Filed Sept. 1, 1998)

Petitioner Gregory Arthur Ott, brought this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The court heretofore referred this matter to the Honorable Robert W. Faulkner, United States Magistrate Judge, at Sherman, Texas, for consideration pursuant to applicable laws and orders of this court. The court has received and considered the Report of the United States Magistrate Judge filed pursuant to such order, along with the record, pleadings and all available evidence. Both parties submitted objections to the Report and Recommendation. This requires a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b).

The issue for review concerns the application of the limitation provision of 28 U.S.C. § 2244(d) to the above-styled habeas corpus petition. Petitioner filed a state application for writ of habeas corpus on April 23, 1997, nearly nineteen years after the underlying conviction.

The Texas Court of Criminal Appeals denied the application on September 17, 1997. The present petition was filed on September 23, 1997. The magistrate judge recommends the petition be dismissed as time barred.

Respondent's objections assert FED. R. CIV. P. 6(e) should not apply to the time period after the Texas Court of Criminal Appeal's denial. This court agrees in accordance with the authority cited by the respondent. However, this determination does not undermine the magistrate judge's recommendation.

Petitioner's objections assert (1) Saturday and Sunday should be excluded from computation pursuant to FED. R. CIV. P. 6, (2) Supreme Court Rule 13 should apply allowing petitioner an additional ninety days from the time the Texas Court of Criminal Appeals denies relief in state habeas matters, (3) he should receive the benefit of equitable tolling because he was awaiting the decision in *Johnson v. Rodriguez*, 110 F.3d 299, 302-03 (5th Cir. 1997), *cert. denied*, 118 U.S. 559 (1997), prior to bringing his parole claim in the current petition and the "white card" action by the Texas Court of Criminal Appeals, and (5) lastly, petitioner asserts he has sound evidence that he is actually innocent of the underlying murder for which he stands convicted.

Petitioner's argument regarding not counting Saturday and Sunday in limitation computations is without merit and no authority is cited for petitioner's view. Petitioner's second claim regarding Supreme Court rule 13 is unresolved in the courts. However, the plain language requirement of a "properly filed" State post-conviction or other collateral review proceeding found in 28

U.S.C. § 2244(d)(2) does not allow for consideration of time in which a pleading could be filed or is improperly filed. Petitioner's claim regarding equitable tolling is without merit. Petitioner waited nineteen years to bring the current petition. The parole claim was ripe for consideration at the time petitioner was first denied parole, long before the decision in *Johnson*. Lastly, regarding petitioner's claim of actual innocence. Petitioner's long wait to bring the current petition is not tempered with any claim that the factual predicate for actual innocence was not available long ago, when the petition should have been brought. The decision to wait until the last possible day to bring a state application and then the miscalculation which led to the late filing of the present petition does not require this court to bend statutory limitations that were put in place to ensure the finality of state judgments. Petitioner has waited too long to bring the current petition.

Accordingly, respondent's objection is **SUSTAINED**. Petitioner's objections are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct and the report of the magistrate judge is **ADOPTED**. A final judgment will be entered in this case in accordance with the magistrate judge's recommendations. The order referring this case to the magistrate judge is hereby **VACATED**.

SIGNED this 31st day of August, 1998.

/s/ Paul Brown
PAUL BROWN
UNITED STATES
DISTRICT JUDGE

Notice set to:

David L. Botsford
William Charles Zapalac

Supreme Court, U.S.
FILED
MAR 31 2000
CLERK

(3)

No. 99-1476

In The

Supreme Court of the United States

GREGORY ARTHUR OTT,

Petitioner,

v.

GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

On Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals

SUPPLEMENTAL BRIEF ON PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER 28 U.S.C. § 2244(d)(2), WHICH TOLLS THE LIMITATIONS PERIOD FOR FILING A FEDERAL HABEAS PETITION FOR "STATE POST-CONVICTION OR OTHER COLLATERAL REVIEW," INCLUDES THE NINETY DAYS IN WHICH A STATE HABEAS PETITIONER MAY FILE A PETITION FOR WRIT OF CERTIORARI IN THIS COURT?

WHETHER EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS IN 28 U.S.C. § 2244 MAY BE DENIED A STATE INMATE FOR WHOM TIMELY FILING OF THE PETITION IN FEDERAL COURT WAS RENDERED IMPOSSIBLE BY IRREGULAR STATE COURT NOTICE OF DECISION?

WHETHER BRIEFING OF ISSUES ON APPEAL PROVIDES SUFFICIENT NOTICE TO A CIRCUIT COURT FOR EXPANSION OF A CERTIFICATE OF APPEALABILITY?

INTERESTED PARTIES

1. Gregory Arthur Ott, Petitioner.

2. Gary L. Johnson, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.

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SUPPLEMENTAL ARGUMENT

1. The Fifth Circuit's decision is in conflict with newly released "equitable tolling" decisions of federal district courts in at least two other Circuits by holding that failure to file within the limitations period was attributable to the petitioner when, but for a court's failure to provide notice within the statutory period of limitations, filing would have been timely.

This Court permits supplementation of a petition for writ of certiorari in order to call attention to "new cases . . . not available at the time of the party's last filing." Rule 12, Paragraph 8, Rules of the Supreme Court of the United States. Ott's petition was filed by the printer[1] in this Court on March 2, 2000. On March 2nd and 3rd, two cases were issued by federal district courts that have an important bearing upon Ott's second question presented regarding "equitable tolling." *See Hunter v. Greiner*, 2000 WL 245864 (S.D.N.Y. March 3, 2000) (**Appendix A**); *Brandon v. United States*, 2000 WL 245703 (E.D. Va. March 2, 2000) (**Appendix B**).

The Texas Court of Criminal Appeals' "white card" notice of its denial of Ott's state post-conviction petition was not received by Ott until after the statute of limitations in 28 U.S.C. § 2244(d)(2) had run, making it impossible for him to timely file his first and only federal petition for writ of habeas corpus under 28 U.S.C. § 2254. *See* Petition for Writ of Certiorari at 7, 9, 24, and App. 4. Ott

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[1] Cockle Law Brief Printing Co., 2311 Douglas Street, Omaha, Nebraska 68102-1283; 1-800-225-6964. Cockle express mailed the petition in the U.S. mail system, for next day delivery, to the Clerk of this Court on March 1, 2000.

filed his state post-conviction petition on April 23, 1997, one day before his "grace period" would expire for filing the federal petition. *Id.* at 7. No answer was filed by the State and no evidentiary hearing was held by the State district court. When the district court passed the case on to the Texas Court of Criminal Appeals, undersigned counsel filed a pre-submission brief in the Court of Criminal Appeals pointing out the necessity of an evidentiary hearing due to the allegations in the petition. The Court of Criminal Appeals did not communicate with Ott or the undersigned until it mailed the "white card" notifying Ott and counsel that it had "denied without written order" Ott's petition on Wednesday, September 17, 1997. The "white card" was postmarked on Thursday, September 18, 1997. With one day left, the statute of limitations ran on Friday, September 19, 1997. The "white card" arrived via the mail at the undersigned counsel's office on Saturday, September 20, 1997. Counsel sent Ott's federal petition for writ of habeas corpus by Federal Express on Monday, September 22, 1997, to the United States District Court, Southern District, Houston Division, where it was filed on September 23, 1997. *See id.* at 9.

The district courts in *Hunter* and *Brandon* would have equitably tolled Ott's statute of limitations, allowing timely filing of his federal petition. Both stand for the proposition that "[w]here a petitioner, through no fault of his own, first learns of the outcome of a final appeal after the time for seeking habeas has expired, equitable tolling is appropriate." *Hunter*, 2000 WL 245864, at *3 (Supp. Br. 7) (citing *Vasquez v. Greiner*, 68 F. Supp. 2d 307, 309 (S.D.N.Y. 1999); *McCoy v. Walker*, 99 Civ. 3926, 1999 WL 1191988, at *6 (S.D.N.Y. Dec. 14, 1999); *Miller v. New Jersey*

State Dep't of Corrections, 145 F.3d 616, 618-19 (3d Cir. 1998); *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998));[2] *see Brandon*, 2000 WL 245703, at *3 (citing *Baskin v. United States*, 998 F. Supp. 188, 190 (D. Conn. 1998); *Vasquez*, 68 F. Supp. 2d at 310)).

The District Court for the Southern District of New York held in *Hunter* that "[e]quitable tolling is [ ] warranted when a petitioner is effectively prevented from timely pursuit of habeas relief." *Hunter*, 2000 WL 245864, at *3 (Supp. Br. 8). The Court noted, however, that equitable tolling generally would not be available when "the claimant failed to exercise due diligence in preserving his legal rights." *Id.* (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). The "question" for the Court, therefore, was whether Hunter had acted with reasonable diligence to inquire into the outcome of his State post-conviction petition, so as to preserve his right to file in federal court. *Id.* at *4 (Supp. Br. 8). The § 2244 tolling period began to run when Hunter's time to file a petition for certiorari to this Court expired on or about August 16, 1997. *Id.* at *2 (Supp. Br. 5). He filed a State application for writ of coram nobis on May 12, 1998, tolling the statute of limitations until the application was denied on November 5, 1998. *Id.* at *2-*3 (Supp. Br. 6). The limitations period ran on February 9, 1999. *Id.* Hunter received a copy of the State court's order denying his application for writ of coram nobis by mail on March 25, 1999. *Id.* He filed his federal petition almost a month after receiving notice, on

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[2] *See* Petition for Writ of Certiorari at 26 (pointing out the sharp contrast between Ott's case and *Davis* within the same Circuit).

April 19, 1999. *Id.* at *4 (Supp. Br. 8). In defense against the Respondent's assertion of the statute of limitations, Hunter argued that the statute "should be tolled an additional four-and-a-half months during which he was unaware of the disposition of his petition for a writ of error coram nobis, thereby giving him until approximately June 23, 1999 to file." *Id.* at *3 (Supp. Br. 7). Noting that it must decide whether Hunter acted with reasonable diligence in allowing ten months to elapse (May 12, 1998 until March 25, 1999) "apparently without inquiring as to the outcome of his application," the district court held, "**[b]ased on this record, I am unable to assess the reasonableness of petitioner's conduct. I will therefore assume that he acted with reasonable diligence.**" *Id.* at *4 (Supp. Br. 8) (emphasis added). As a result, the district court applied equitable tolling and held that Hunter's petition was not time-barred. *Id.* There is nothing in the record in Ott's case, either, that suggests Ott "slept on his rights" or demonstrated anything less than the most reasonable diligence in following his case through the Texas post-conviction system. Additionally, unlike Hunter, who filed more than two months outside the limitations period and almost one month[3] after receiving notice, Ott filed his federal petition **immediately** upon receiving notice by mail that he had been denied relief in the State court.

The district court's opinion in *Brandon* is even more supportive of Ott's right to equitable tolling. This Honorable Court, in fact, is the court in *Brandon* that apparently

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[3] The petitioner in *Hunter* appears to have been unrepresented by counsel.

did not inform the petitioner of a decision that caused the limitations period to run until timely filing was no longer possible. Brandon's petition for writ of certiorari on direct appeal from a federal conviction was denied by this Court on May 13, 1996, causing the limitations period to begin to run. Brandon's § 2255 motion was filed on September 10, 1998, more than a year after the one-year window for filing had closed on May 13, 1997. *Brandon*, 2000 WL 245703, at *1 (Supp. Br. 20). In response to the Government's argument that the petition was time-barred, Brandon urged that the statute should be equitably tolled "because neither he, nor his counsel, were notified of [this Court's] denial of certiorari until September 10, 1997, and the instant petition was filed within one year of that date." *Id.* at *3 (Supp. Br. 23). The district court made the following findings:

> 1. Brandon's direct review counsel "averred that he was not notified of the denial of certiorari" until he contacted this Court on September 10, 1997. *Id.* (Supp. Br. 24).
>
> 2. Brandon's post-conviction counsel averred that, in August 1998, he reviewed this Court's file of Brandon's codefendant, finding a copy of notice of denial of certiorari sent to the codefendant, but "no correspondence or other documentation in the file indicat[ing] that [Brandon] or his counsel were notified of the denial of certiorari." *Id.* (Supp. Br. 24).
>
> 3. "The government [did] not refute the fact that petitioner did not receive either actual or constructive notice of the denial of certiorari until after the limitations period expired." *Id.* (Supp. Br. 24).

The district court held that, because Brandon, "through no fault of his own, first learned of the outcome of his final appeal after the time for seeking habeas review had expired, equitable tolling [was] appropriate." *Id.* at *4 (Supp. Br. 24). In so holding, the district court rejected unsupported argument by the Government, like that which has been made in Ott's case, that because the court's decision was public record (which the Government argued could have been accessed at any time before the limitations period expired) equitable tolling was not warranted. *Id.* (Supp. Br. 25). The court found that the Government's argument led to an "absurd result": "courts would have no reason to provide notice of their decisions in these matters because prisoners, like petitioner, who have no meaningful access to court records, would be deemed to know the contents of such records." *Id.* (Supp. Br. 25).

Nothing in the record below suggests that Ott had such "meaningful access to court records" that he should be held accountable for failure to file within the limitations period. Ott must be presumed to have acted with reasonable diligence, given the fact that he was ready to file (and did file) his federal petition immediately upon receiving notice of the state court's decision. That notice arrived too late for Ott to comply with 28 U.S.C. § 2244(d), through no fault of his own. The new cases suggest that Ott would have found his case equitably tolled in other district courts, reflecting an uneven administration of justice, and a potential for circuit conflict over the relationship between notice and the statutory deadline in § 2244(d) for equitable tolling purposes.

CONCLUSION

The petition for writ of certiorari should be granted to address these issues of nationwide significance.

Respectfully submitted,

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APPENDIX A

Terrance HUNTER, Petitioner,

v.

Charles GREINER, Respondent.

No. 99 CIV. 4191(SAS).

United States District Court, S.D. New York.

March 3, 2000.

Terrance Hunter, Sing Sing Correctional Facility, Ossining, for Petitioner (Pro Se).

Rebecca Ann Durden, Assistant Attorney General, New York, for Respondent.

OPINION AND ORDER

SCHEINDLIN, D.J.

Petitioner Terrance Hunter ("Hunter" or "petitioner"), proceeding pro se, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his 1995 conviction on two counts of criminal possession of a controlled substance in the first and third degrees. *See* Amended Petition for Writ of Habeas Corpus, ("Hunter Pet."), dated July 22, 1999, at 2. Hunter challenges his conviction on four grounds: (1) the trial court altered its *Sandoval* ruling, thereby prejudicing petitioner; (2) the trial court erroneously admitted evidence obtained pursuant to an unreasonable search and seizure; (3) the trial court erroneously admitted evidence obtained pursuant to petitioner's unlawful arrest; and (4) ineffective assistance of appellate counsel. *See id.* at 5-6. For the reasons set forth below, the petition is denied.

I. Factual Background

At approximately 7:53 p.m. on August 28, 1994, New York City police officers Edward Browne ("Browne"), Michael Roberts ("Roberts"), and Robert Aguilar ("Aguilar") were on routine patrol in their unmarked police car when they received a radio transmission that two black men were selling guns out of a black Honda Accord with Alabama license plates at a particular location. *See Mapp/Sandoval* Hearing Transcript ("H") at 6-7; Trial Transcript ("T"), April 19, 1995, at 35. The officers drove to the location where they saw a parked dark blue Honda Accord, but no one was near or inside the vehicle. *See* T at 36-37. Approximately fifteen minutes later, the officers saw petitioner enter the car. *See id.* at 43. The officers then drove up to the car. *See id.* Just before they stopped in front of the vehicle, the officers turned on their police siren and flashing lights. *See* H at 10.

Upon seeing the police car approach, petitioner jumped out of the Honda and fled down the street. *See id.* at 11-12; T at 45. Officers Roberts and Browne immediately gave chase. *See* T at 45-46. Officer Browne saw petitioner run by a church where a crowd of people were attending an outdoor service and throw a package to the ground. *See id.* at 47-49. The officers continued to chase petitioner who was eventually stopped a few blocks away. *See id.* at 60. The officers handcuffed petitioner, frisked him and then returned to the church to retrieve the package. It contained approximately one kilogram of cocaine in brick form and wrapped in clear cellophane. *See id.* at 61-64. The officers also recovered $3,514 in cash from petitioner's right front pocket. *See* T, April 20, 1995, at 123-24.

II. Procedural History

Petitioner was charged with criminal possession of a controlled substance in the first and third degrees. *See* N.Y. Pen. Law §§ 220.21(1) and 220.16(1) (McKinney 2000). On April 17, 1995, a combined Mapp/Sandoval hearing was held in New York State Supreme Court, New York County, on petitioner's motion to suppress the physical evidence, specifically the cash and the cocaine, and to limit cross-examination regarding several prior convictions. The court denied petitioner's motion, ruling that the conduct of the officers did not violate his constitutional rights. The court also ruled that the prosecution could cross-examine petitioner regarding the fact of his prior convictions, but not as to the substance of the offenses underlying those convictions. *See* H at 47-52. On April 24, 1995, a jury convicted Hunter of both counts of criminal possession of a controlled substance. *See* T at 390. On May 15, 1995, Hunter, a second felony offender, was sentenced to concurrent terms of ten to twenty years and fifteen years to life. *See Hunter* Pet. at 2. He is currently incarcerated at Sing Sing Correctional Facility in Ossining, New York.

Petitioner appealed his conviction to the Appellate Division, First Department, alleging that: (1) the trial court erred in refusing to suppress the physical evidence; (2) the prosecution failed to prove the required elements of knowledge and possession as to the crimes charged; (3) the trial court failed to properly instruct the jury that he should be acquitted in the event the prosecution failed to satisfy its burden of proving each and every element of the crimes charged; (4) the trial court altered its prior *Sandoval* ruling, thereby prejudicing Hunter; (5) the trial

court deprived Hunter of a fair trial by failing to question a juror regarding potential bias, and; (6) Hunter's sentences were unduly harsh and excessive. *See* Declaration in Opposition ("Opp.Decl."), Ex. B, Brief for Defendant-Appellant, at 6-8. Petitioner was represented by counsel on the appeal. On January 30, 1997, the Appellate Division affirmed petitioner's conviction. *See People v. Hunter*, 653 N.Y.S.2d 319 (1st Dep't 1997). Petitioner sought leave to appeal to the Court of Appeals which was denied on May 16, 1997. *See People v. Hunter*, 89 N.Y.2d 1094 (1997).

Petitioner then applied pro se to the Appellate Division for a writ of error coram nobis on May 12, 1998, alleging ineffective assistance by his appellate counsel in failing to raise the following claims: (1) the trial court erroneously "injected its own interpretation of the evidence," and; (2) state prosecutors "surreptitiously changed their theory on appeal." *See Hunter* Pet. at 3-4. This application was denied on November 5, 1998. *See People v. Hunter*, 683 N.Y.S.2d 688 (1st Dep't 1998).

III. Discussion

A. Is Hunter's Petition Time-Barred?

Petitioner filed for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on April 19, 1999. By Order dated June 11, 1999, this Court directed petitioner to show cause as to why his petition was not untimely under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d). AEDPA, signed into law on April 24, 1996, provides in relevant part:

> (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by

> a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

28 U.S.C. § 2244(d)(1)(A). AEDPA further provides in relevant part:

> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2).

The following chronology is relevant. Petitioner was sentenced on May 15, 1995, and his conviction was affirmed on January 30, 1997. On May 16, 1997, the New York Court of Appeals denied petitioner leave to appeal to the state's highest court. *See People v. Hunter*, 89 N.Y.2d 1094 (1997). Thus, petitioner's judgment became final on or about August 16, 1997, when his time to file a petition for certiorari to the United States Supreme Court expired. *See Hughes v. Irvin*, 967 F.Supp. 775, 778 (E.D.N.Y.1997) (petitioner's judgment became final 90 days after the New York Court of Appeals denied him leave to appeal) (citing Rule 13 of Rules of the Supreme Court of the

United States).[1] Petitioner filed an application for a writ of error coram nobis on May 12, 1998. His application was denied on November 5, 1998. Petitioner asserts, however, that he did not learn of this denial until at least March 25, 1999, when he received a copy of the decision by mail. *See* Petitioner's Affirmation ("Pet.Aff."), dated July 6, 1999, at 1-2.

Pursuant to 28 U.S.C. § 2244(d)(2), petitioner's application for a writ of error coram nobis tolled the statute of limitations from May 12, 1998 until November 5, 1998. Thus, the three months left between May 12, 1998 and August 16, 1998 began to run again on November 5, 1998. Therefore, if petitioner had been timely notified of the denial, he should have filed his habeas petition on or about February 9, 1999. However, petitioner argues that the statute of limitations should be tolled an additional four-and-a-half months during which he was unaware of the disposition of his petition for a writ of error coram

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[1] Rule 13 of the United States Supreme Court provides in part:

> (1) Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

nobis, thereby giving him until approximately June 23, 1999 to file.

The word "pending" in § 2244(d)(2) refers to the period of time during which a motion is pending but not yet decided. *See Bennett v. Artuz*, 199 F.3d 116, 119 (2d Cir.1999) (holding that a state court petition is "pending" from the time it is filed until the time it is finally disposed of and further appellate review is unavailable under state procedures); *see also Shin v. Walker*, 97 Civ. 7048, 1999 WL 345285, at *1 (E.D.N.Y. May 24, 1999) ("the word 'pending' in § 2244(d)(2) unambiguously refers to the period of time during which a motion has been filed but not yet decided") (citing *Geraci v. Senkowski*, 23 F.Supp.2d 246, 252 (E.D.N.Y.1998)). Thus, the toll generally expires when the motion is decided regardless of when the petitioner learns of that decision.

The next question, however, is whether the doctrine of equitable tolling should be applied under the circumstances. A number of courts have held that "[w]here a petitioner, through no fault of his own, first learns of the outcome of a final appeal after the time for seeking habeas has expired, equitable tolling is appropriate." *Vasquez v. Greiner*, 68 F.Supp.2d 307, 309 (S.D.N.Y.1999) (citing *Baskin v. United States*, 998 F.Supp. 188, 190 (D.Conn.1998)); *see also McCoy v. Walker*, 99 Civ. 3926, 1999 WL 1191988, at *6 (S.D.N.Y. Dec. 14, 1999) (holding that the language of 28 U.S.C. § 2244(d) is consistent with equitable tolling); *Miller v. New Jersey State Dep't of Corrections*, 145 F .3d 616, 618-19 (3d Cir.1998) ("the language [,] . . . legislative history . . . [and] statutory purpose of AEDPA [indicate] that Congress intended the one-year period of limitation to function as a statute of limitation

and be subject to equitable tolling"); *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir.1998) ("[I]n rare and exceptional circumstances, [AEDPA] can be equitably tolled").

Equitable tolling is thus warranted when a petitioner is effectively prevented from timely pursuit of habeas relief. Its use is typically available only when a petitioner "was prevented in some extraordinary way from exercising his rights." *Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Cir.1996) (citation omitted). Equitable tolling will generally not be available where "the claimant failed to exercise due diligence in preserving his legal rights." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). Petitioner was thus required to exercise reasonable diligence in following his application for a writ of error coram nobis.

The question, then, is whether petitioner acted with reasonable diligence in allowing ten months to elapse, from May 12, 1998 until March 25, 1999, apparently without inquiring as to the outcome of his application. *See Plowden v. Romine*, 99 Civ. 3752, 1999 WL 1281497, at *4 (E.D.N.Y. Dec. 29, 1999) (holding that it was unreasonable for petitioner to allow more than seventeen months to expire between the date on which he sought leave to appeal to the New York Court of Appeals and the date on which he inquired about the status of his request).

Based on this record, I am unable to assess the reasonableness of petitioner's conduct. I will therefore assume that he acted with reasonable diligence. As a result, I shall apply the doctrine of equitable tolling and hold that Hunter's petition, filed on April 19, 1999, is not time-barred.

B. Was Petitioner Prejudiced by the Court's Modification of its *Sandoval* Ruling?

Petitioner asserts that he was prejudiced and deprived of a fair trial when the trial judge altered its pre-trial *Sandoval*[2] ruling and allowed the state to cross-examine Hunter about his three prior felony convictions. Prior to trial, the trial judge held a *Sandoval* hearing and ruled that if petitioner testified, he could be questioned by the state about three prior felony convictions, but could not be impeached with the substance of the offenses underlying those convictions.[3] *See* H at 52. At trial, defense counsel requested a clarification of the ruling. *See* T, April 20, 1995, at 157. The court held that cross-examination would be limited to two prior felony convictions. *See id.* at 158.

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[2] On defendant's motion, the court must hold a pre-trial hearing during which it may make a prospective ruling limiting the prosecutor's cross-examination of defendant about any "prior specific criminal, vicious and immoral acts." *People v. Sandoval*, 34 N.Y.2d 371, 373 (1974).

[3] The relevant portion of the *Sandoval* hearing is as follows:

The Court: "[Hunter] has two felony convictions. You can allude to the fact that you have two felony convictions without going into the questions of what the underlying acts are."

[Prosecutor]: "It's three felonies."

The Court: "You can allude to the three felony convictions as such, nothing more . . . Three felonies is enough. It goes to the credibility and that's what it's supposed to be all about."

H at 52.

On direct examination, Hunter testified that he had been convicted of two felonies. *See* T, April 21, 1995, at 236.[4] At the close of the direct examination, the prosecutor requested that he be allowed to question Hunter about his third felony conviction. *See id.* at 259. Defense counsel objected, but without reopening the *Sandoval* hearing, the court agreed that Hunter had opened the door to such questioning by testifying that he had been convicted of only two felonies, and the state was not "limited to the *Sandoval* statement." *Id.*

The admission of a prior conviction in order to impeach the defendant is an evidentiary ruling and is only redressable in a federal habeas corpus proceeding if there is a showing that the particular errors were of constitutional magnitude. *See Benitez v. Senkowski*, 97 Civ. 7819, 1998 WL 668079, at *7 (S.D.N.Y. Sept. 17, 1998) (citations omitted). Evidentiary errors must be "so pervasive as to have denied [petitioner] a fundamentally fair trial." *Collins v. Scully*, 755 F.2d 16, 18 (2d Cir.1985).

A defendant may not deceive a jury under the guise of a pre-trial *Sandoval* ruling. *See People v. Santiago*, 564 N.Y.S.2d 412, 413 (1st Dep't 1991) ("A *Sandoval* ruling does not allow a defendant to deceive the jury and be free

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[4] The relevant portion of the trial testimony is as follows:

[Defense Counsel]: "Mr. Hunter, I am going to ask you, have you ever been convicted of a felony before?"

Hunter: "Yes, I have."

[Defense Counsel]: "How many times?"

Hunter: "Twice."

T at 236.

from confrontation, as a defendant who takes the stand is obliged to speak truthfully and accurately") (citations omitted).

> Although a court should not, ordinarily, modify a *Sandoval* . . . ruling once a defendant has taken the stand or prepared a defense in reliance thereon, such is not the case where . . . the latter has testified in a manner that is likely, in the absence of a modification, to mislead the jury with respect to the precluded evidence.

People v. Schwerbel, 638 N.Y.S.2d 198, 199 (3d Dep't 1996) (citations omitted). There is no requirement under either federal or state law that the trial court must re-open the pre-trial hearing or hold another hearing before amending its earlier ruling. *See id; see also Palmieri v. Defaria*, 88 F.3d 136, 139 (2d Cir.1996) (holding that an in limine evidentiary ruling is not a final ruling on admissibility and the district judge is entitled, in the exercise of sound judicial discretion, to alter a previous in limine ruling) (citation omitted).

Petitioner testified under oath that he only had two prior convictions. *See* T, April 21, 1995, at 236. The prosecutor was entitled to impeach this testimony. Furthermore, in asking petitioner at trial whether he had been convicted of a third felony, the prosecutor did not elicit any testimony concerning the underlying bases for the convictions. The trial court also specifically instructed the jury that this testimony was admitted for a limited purpose, namely credibility, and was not to be considered with respect to guilt or innocence. *See* T, April 24, 1995, at 367. The jury is presumed to have followed this cautionary instruction. *See Shannon v. United States*, 512 U.S. 573,

585 (1994). Accordingly, petitioner's writ of habeas corpus is denied on this ground.

C. Petitioner's Fourth Amendment Claims

Petitioner argues that the physical evidence presented at trial was obtained pursuant to: (1) an unconstitutional search and seizure, and (2) an unlawful arrest. *See Hunter* Pet. at 6. This Court is precluded from considering those claims for the following reasons.

In *Stone v. Powell*, 428 U.S. 465, 495 (1976), the Supreme Court held that "where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." The issue, then, is whether Hunter was afforded an opportunity for full and fair litigation of his claims that his Fourth Amendment rights were violated. "[T]his circuit has developed a litmus test to determine when a state prisoner has been denied an opportunity for full and fair litigation of his fourth amendment claims." *Capellan v. Riley*, 975 F.2d 67, 70 (2d Cir.1992) (citing *Gates v. Henderson*, 568 F.2d 830, 840 (2d Cir.1977)). Review of such claims should be undertaken in only two instances: (1) if the state has provided no corrective procedures at all to redress the alleged Fourth Amendment violations; or (2) if the state has provided a corrective mechanism, but the defendant was precluded from using that mechanism because of an unconscionable breakdown in the underlying process. *See Capellan*, 975

F.2d at 71; *see also McPhail v. Warden*, Attica Correctional Facility, 707 F.2d 67, 70 (2d Cir.1983).

Neither of these exceptions apply here. First, New York does provide a statutory procedure for defendants to litigate Fourth Amendment search and seizure issues before trial. *See* N.Y.Crim. Proc. Law § 710 et seq. (McKinney 1995 & Supp.1999-2000). Petitioner cannot assert that this procedure is insufficient to redress his claims as courts in this circuit have expressly approved New York's procedure for litigating Fourth Amendment claims. *See Senor v. Senkowski*, 97 Civ. 4929, 1999 WL 689477, at *8 (E.D.N.Y. Aug. 31, 1999) (citing *Gates*, 568 F.2d at 837 n. 4)).

Second, petitioner is unable to demonstrate that "no state court . . . conducted a 'reasoned method of inquiry into relevant questions of fact and law' or any inquiry at all into [his] Fourth Amendment claim[s]." *Senor v. Senkowski*, 1999 WL 689477, at *9 (quoting *Shaw v. Scully*, 654 F.Supp. 859, 864 (S.D.N.Y.1987)); *Capellan v. Riley*, 975 F.2d at 71. Indeed, petitioner availed himself of New York's statutory procedure when he moved to suppress the admission of the cocaine and the $3,514 in cash at the Mapp hearing prior to his trial. *See Lipuma v. Commissioner*, Dep't of Corrections, 560 F.2d 84, 93 n. 6 (2d Cir.1977) (petitioner afforded opportunity for full and fair litigation when his Fourth Amendment claims were raised and argued before the state courts). At this hearing, held on April 17, 1995, the state court specifically reviewed the merits of petitioner's Fourth Amendment claims – that police stopped and seized him without the requisite reasonable suspicion, and that the police seized the contraband pursuant to an unreasonable search and

seizure. Officer Browne testified in great detail at this hearing about the search and seizure in issue. *See* H at 5-38. The trial court conducted a "reasoned method of inquiry into the relevant questions of fact and law," *Capellan v. Riley*, 975 F.2d at 71 (citations omitted), and found that both the cocaine and the money were admissible. *See* H at 49-51. Furthermore, petitioner appealed the trial court's denial of his motion to suppress to the Appellate Division which affirmed the trial court's ruling on the merits.

Petitioner has not shown that he was denied an opportunity to fully and fairly litigate his claim or that he was precluded from doing so because of an unconscionable breakdown in the underlying process. Rather, petitioner fully utilized the state's procedures to redress the alleged violation of his Fourth Amendment rights. Even if the Appellate Division erroneously decided the issue, a petitioner cannot gain federal review of a Fourth Amendment claim simply because a federal court may reach a different result. *See Capellan v. Riley*, 975 F.2d at 71. Petitioner's Fourth Amendment claims do not warrant habeas relief.

D. Was Petitioner Denied Effective Assistance of Appellate Counsel?

Petitioner alleges ineffective assistance of appellate counsel due to: the failure by his appellate counsel, Michael Sheinberg, who was also his trial counsel, to "argue that the hearing court erroneously failed to alert [the appellate] court that the People surreptitiously changed their theory on appeal." *Hunter* Pet. at 5.

Under the Sixth Amendment to the Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This right encompasses the right to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Mayo v. Henderson*, 13 F.3d 528 (2d Cir.1994). In *Strickland*, the Supreme Court announced a two-pronged test to determine if counsel's assistance is ineffective. First, petitioner must show that counsel's performance was deficient. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Counsel's performance is to be judged by an objective standard of reasonableness. *Id.* at 688. Moreover, "judicial scrutiny of counsel's performance must be highly deferential . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

Second, petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The court must consider the totality of the evidence before the judge or jury. *Id.* at 695-96. These principles do not establish mechanical rules by which an attorney's performance should be rated. *Id.* at 696. The focus of the inquiry should be on the fundamental fairness of the trial, and whether, despite the strong presumption of reliability, the result is unreliable because of a breakdown of the adversarial process. *Id.*

While this standard was originally applied only to trial counsel, it since has been expanded to appellate

counsel. *See Mayo*, 13 F.3d at 528. The reviewing court should not second-guess the reasonable professional judgment of appellate counsel. *Tsirizotakis v. LeFevre*, 736 F.2d 57, 65 (2d Cir.1984).

Petitioner alleges that his appellate counsel should have argued that the People were barred from advancing a "new theory on appeal," namely, that the police encounter with petitioner constituted an "approach to inquire", when their theory at trial was that the police stopped the petitioner when they drove up to his car. *See* Opp. Decl., Ex. F., Defendant's Memorandum of Law In Support of Motion for Writ of Error Coram Nobis, at 24-25. Petitioner further argues that the trial court "basically changed the theory of the People's case from a stop involving restraint to a mere attempt to inquire of petitioner's activities." *Id.* at 22.

Petitioner's claim of ineffective assistance of appellate counsel is without merit. Petitioner fails to show that the performance of his appellate counsel was so unreasonable that he failed to function as the counsel guaranteed by the Sixth Amendment. At the Mapp hearing prior to trial, defense counsel argued that the seized contraband should be suppressed because the police did not have reasonable suspicion to stop petitioner's car. *See* H at 41. He further argued that the police, at most, were entitled to question petitioner, not to pursue him, when he ran from the car. *See id.* In denying petitioner's motion to suppress, the trial court found that the police were justified in approaching petitioner after he entered the car to "inquire as to his activities." H at 48. Furthermore, the trial court found that the police had reasonable suspicion

to pursue, stop and search petitioner after he fled. *See id.* at 49-50.

Defense counsel challenged the trial court's denial of petitioner's motion to suppress the contraband. In a comprehensive 55-page brief to the Appellate Division, he reviewed the trial proceedings extensively and presented the facts in a manner favorable to petitioner. The substantive arguments were well presented and researched. Counsel argued that because the police officers lacked reasonable suspicion to stop and seize petitioner by blocking his car with their unmarked vehicle, the contraband should have been excluded. *See* Opp. Decl., Ex. B., Brief for Defendant-Appellant, at 27-37. This argument was identical to that raised at the pre-trial Mapp hearing. The Appellate Division held that petitioner's motion to suppress was properly denied, finding that the radio report that guns were being sold from an automobile at a particular location and the confirmatory police observations at the scene provided objective, credible reasons for the police to approach the car and seek information from petitioner. *See People v. Hunter*, 653 N.Y.S.2d 319, 320 (1st Dep't 1997). The court also found that petitioner's flight provided the police with reasonable suspicion that criminal activity was at hand, thus justifying the subsequent police pursuit and stop of petitioner. *See id.*

It was entirely reasonable for appellate counsel to omit an argument that the state changed its theory regarding the basis for the stop. While appellate counsel need not raise every colorable claim or argument, including non-frivolous ones, in order to provide effective assistance, *Jones v. Barnes*, 463 U.S. 745 (1983), appellate counsel is considered ineffective when he or she omits

"significant and obvious issues while pursuing issues that were clearly and significantly weaker." *Mayo*, 13 F.3d at 533. The reviewing court, therefore, may examine whether there was a reasonable probability that the claim, if raised, would have been successful before the state's highest court. *See id.* at 533-34. Petitioner's claim does not meet that test. The comprehensive presentation by counsel regarding the stop of petitioner negates his claim that counsel's performance was deficient under the *Strickland* test.

Similarly, petitioner has not demonstrated that had counsel raised the issue of the People's change of theory, the result of the appeal would have been any different. Thus, petitioner has failed to satisfy the second prong of *Strickland*. Accordingly, the ineffective assistance of counsel claim does not warrant habeas relief.

IV. Conclusion

For the reasons set forth above, Hunter's petition for a writ of habeas corpus is denied. Further, petitioner has failed to make a substantial showing of denial of a constitutional right, and a certificate of appealability therefore is denied. *See* 28 U.S.C. § 2253(c)(2). The Clerk of the Court is directed to close this case.

SO ORDERED:

APPENDIX B

Raynaldo BRANDON, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

Nos. Civ.A. 98-1344-AM, Crim. 94-141-A.

United States District Court, E.D. Virginia.

March 2, 2000.

Terrell N. Roberts, III, Riverdale, Maryland, for petitioner.

Tessa M. Gorman, Special Assistant United States Attorney, United States Attorney's Office, Alexandria, VA, for respondent.

ORDER

ELLIS, J.

The matter is before the Court on petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.

Petitioner and three co-defendants were charged in a seven-count indictment with offenses arising out of the prison murder of a fellow inmate at the medium security facility at the District of Columbia Department of Corrections Facility in Lorton, Virginia. The evidence introduced at trial showed that petitioner and his co-defendants attacked the victim outside of their dormitory. Eyewitness accounts stated that one of the co-defendants grabbed the victim from behind and held him while petitioner and another co-defendant fatally stabbed the

victim in the head and chest. Initially, petitioner claimed to be in Arabic language class at the time of the stabbing. At trial, however, petitioner presented an alibi witness who stated that he and petitioner were watching a movie at the time of the murder.

Petitioner was convicted on July 20, 1994, of (i) conspiracy to commit murder, in violation of 18 U.S.C. § 1117, (ii) murder, in violation of 18 U.S.C. §§ 1111, 1112, and (iii) possession of contraband, to wit: a "shank," in violation of 18 U.S.C. § 13, assimilating 53.1 Virginia Code § 203(4). Petitioner appealed his conviction to the United States Court of Appeals for the Fourth Circuit, which denied his appeal on March 1, 1996. *See United States v. Smith, et al.*, 78 F.3d 580, 1996 WL 88056 (4th Cir. March 1, 1996) (unpublished disposition). Petitioner then filed a petition for writ of certiorari to the United States Supreme Court, which was denied on May 13, 1996. *See Smith et al. v. United States*, 517 U.S. 1199 (1996). The instant § 2255 motion was filed here on September 10, 1998.

Petitioner attacks his conviction on three separate grounds. First, petitioner claims that he was denied effective assistance of counsel because his trial counsel failed to interview, or call at trial, known witnesses who, it was later revealed, had information that allegedly exculpated petitioner. In his direct appeal to the Fourth Circuit, petitioner claimed that the government withheld allegedly exculpatory information contained in six summary reports of witness interviews conducted by the FBI in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The Fourth Circuit rejected this claim on the ground that,

even assuming the reports contained exculpatory material, the government's failure to disclose them did not violate *Brady* because defense counsel knew of the witnesses and could have interviewed them himself, and "*Brady* does not compel the disclosure of evidence available to the defendant from other sources, including diligent investigation by the defense." *Smith*, 1996 WL 88056, at *4. Seizing on this result, petitioner now claims that his counsel was deficient for failing to interview and call at trial the six witnesses who allegedly possessed the exculpatory information.

Second, petitioner claims that the prosecution's failure to disclose fully the six FBI witness reports was a violation of the *Brady* rule.

Finally, petitioner claims that he was denied his Sixth Amendment right to confrontation as articulated in *Gray v. Maryland*, 523 U .S. 185 (1998). At trial, the government sought to introduce a statement by one of petitioner's co-defendants that implicated co-defendant Smith. To comply with the dictates of *Bruton v. United States*, 391 U.S. 123 (1968), the trial court redacted the statement by replacing Smith's name with the neutral pronoun "individual." Petitioner objected to this redaction on the ground that it created an unfair inference that he was the individual to whom the statement referred. On appeal, the Fourth Circuit rejected petitioner's argument that the redacted statement unfairly implicated him because the trial court had instructed the jury that the statement could only be used against the co-defendant who made the statement. *See Smith*, 1996 WL 88056 at *3. In 1998, the Supreme Court issued its opinion in *Gray v. Maryland*, which held that the *Bruton* protective rule applies to

redacted confessions where the redactions simply replace a name with an obvious blank space, a word such as "deleted," or other similarly obvious indications of alteration. *See Gray*, 523 U.S. at 188. Petitioner now argues that *Gray* constituted a new rule of constitutional criminal procedure which redefines an accused's fundamental rights under the Confrontation Clause, and as a result, he is entitled to a new trial.

Before the merits of petitioner's motion can be addressed, it is necessary to resolve the threshold question of the motion's timeliness. Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a motion for post-conviction relief must be filed within one year of the date the conviction becomes final. *See* 28 U.S.C. § 2255. In this circuit, a conviction becomes final for purposes of § 2255, on the date when the petitioner can no longer seek direct review. *See, e.g., United States v. Walker*, 165 F.3d 22, 1998 WL 756928 (4th Cir.1998) (unpublished disposition) citing *United States v. Simmonds*, 111 F.3d 737, 744 (10th Cir.1997) (deciding that conviction became final after the Supreme Court denied certiorari); 28 U.S.C. § 2244 (providing, for motions attacking state court convictions, that a judgment becomes "final by the conclusion of direct review or the expiration of the time for seeking such review"). An appellant's direct review procedure terminates when his or her petition for certiorari is denied or when the deadline for seeking a writ of certiorari has expired. *See Lambrix v. Singletary*, 520 U.S. 518 (1997); *Allen v. Hardy*, 478 U.S. 255, 258 n. 1 (1986). *See also United States v. Forbes*, 153 F.3d 123, 1998 WL 486339 (4th Cir.1998) (finding conviction became final 90 days after Fourth Circuit's affirmance of district court's judgment of

conviction and barring petition as untimely); *United States v. Dorsey*, 988 F.Supp. 917, 918 (D.Md.1998) (noting growing consensus and holding that conviction becomes final for purposes of § 2255 when petitioner can no longer seek direct review).

Here, the direct review terminated when the petition for certiorari was denied on May 13, 1996, more than one year before petitioner filed the instant motion. This fact, the government argues, compels dismissal of the petition as time-barred. Petitioner concedes that his conviction became final on that date, but argues that the statute of limitations should be equitably tolled because neither he, nor his counsel, were notified of the Supreme Court's denial of certiorari until September 10, 1997, and the instant petition was filed within one year of that date.

The questions presented, then, are (i) whether the AEDPA's one-year statute of limitations is a procedural bar, as opposed to a jurisdictional bar, and thus subject to equitable tolling, and (ii) if so, under what circumstances is equitable tolling applicable. The Fourth Circuit has not addressed either issue. Courts elsewhere however, have determined that "equitable tolling is appropriate under the AEDPA . . . if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Furr v. Robinson*, 2000 WL 152147, at *2 (E.D.Va. Jan. 13, 2000); *see also Moore v. United States*, 173 F.3d 1131, 1133 (8th Cir.1999); *Kapral v. United States*, 166 F.3d 565, 567 (3d Cir.1999); *Calderon v. United States Dist. Ct.*, 163 F.3d 530, 541 (9th Cir.1998); *United States v. Griffin*, 58 F.Supp.2d 863, 868 (N.D.Ill.1999). There is further authority to suggest such extraordinary circumstances exist when the prisoner is unaware that his conviction has

become final until after the one-year limitations period has expired. *See Baskin v. United States*, 998 F.Supp. 188, 190 (D.Conn.1998) (one-year statute of limitations equitably tolled when petitioner's counsel failed to notify him of the denial of certiorari until thirteen months after it occurred); *see also Vasquez v. Grenier*, 68 F.Supp.2d 307, 310 (S.D.N.Y.1999) (factual dispute as to when petitioner first learned of the finality of his conviction precluded dismissal of the petition as untimely).

Here, petitioner claims that neither he, nor his counsel, received notice of the denial of certiorari until September 1997, after the one-year limitations period had expired. Specifically, petitioner's counsel on direct review has averred that he was not notified of the denial of certiorari until September 10, 1997 when he contacted the Supreme Court. Additionally, petitioner's current counsel, Christopher Griffiths, avers that, in August 1998, he reviewed the file in *James Smith, et al. v. United States of America*, Docket No. 95-8542, and found that the file contained a copy of notice of the denial of certiorari sent to counsel for James Smith, petitioner's co-defendant, but no correspondence or other documentation in the file indicated that petitioner or his counsel were notified of the denial of certiorari. The government does not refute the fact that petitioner did not receive either actual or constructive notice of the denial of certiorari until after the limitations period expired. As petitioner, though no fault of his own, first learned of the outcome of his final appeal after the time for seeking habeas review had expired, equitable tolling is appropriate in this case. *See Vasquez*, 68 F.Supp.2d at 310.

The government argues unpersuasively that equitable tolling is not warranted because the denial of certiorari is a public record which petitioner could have accessed any time before the limitations period expired. No supporting authority for this argument was cited,[1] nor has any been found. This is not surprising, for the argument, if accepted, would lead to an absurd result: courts would have no reason to provide notice of their decisions in these matters because prisoners, like petitioner, who have no meaningful access to court records,[2] would be deemed to know the contents of such records. Merely because court decisions are matter of public record is not a sufficient reason to assume that litigants who have no meaningful access to such records are aware of the court decisions that affect their cases. Absent reasonable notice of the decision rendering petitioner's conviction final, it is inequitable to begin the one-year statute

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[1] The sole case cited by the government on this issue, *United States v. Lacey*, 993 F.Supp. 831 (D.Kan.1998), does not support the government's argument and is easily distinguished. In *Lacey*, the petition for the writ of certiorari was denied on October 15, 1996, although petitioner did not receive notice of the decision until five or six days later. Petitioner subsequently filed his § 2255 motion on October 20, 1997, more than one year after his conviction became final. Because the petitioner had ample time to file his petition despite the delay in receiving notice – 360 days as opposed to 365 – the district court declined to apply equitable tolling. *See Lacey*, 993 F.Supp. at 834. By contrast, petitioner here, unlike the *Lacey* petitioner, did not even learn of the denial of certiorari until after the one-year limitations period had passed. Unlike the petitioner in *Lacey*, who had 360 days to file a timely petition, this petitioner never had an opportunity to file a timely petition.

[2] *See Vasquez*, 68 F.Supp.2d at 310.

of limitations period on the day petitioner's conviction became final.

Accordingly, it is hereby ORDERED that the motion to vacate sentence pursuant to 28 U.S.C. § 2255 is not barred as untimely. As a result, the merits of petitioner's claim must be examined.

Because a response from the government would aid in evaluating the merits of the petition, the government is DIRECTED to file a response to the petition by 5:00 p.m., Friday March 17, 2000. Petitioner may file a reply by 5:00 p.m., Friday March 31, 2000.

The Clerk is directed to send a copy of this Order to petitioner and all counsel of record, and to send copies of this Order and the relevant pleadings in this matter to the United States Attorney for this District.